THE

# LAW

OF

## Mees and Trusts:

Collected and Digested

In a proper ORDER, from the REPORTS of adjudg'd CASES, in the Courts of LAW and EQUITY, and other Books of Authority.

Together with

### A Treatise of DOWER.

To which is added,

A Complete TABLE of all the MATTERS therein contain'd.

In the SAVOY:

Printed by E. and R. Nurr, and R. Gosling, (Assigns of E. Sayer, Esq.) for 18. Gosling, at the Crown and Mitre against Fetter-Lane in Fleet-Street. M DCC XXXIV.

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THE

### LAW

OF

#### USES and TRUSTS.

#### Df Ales.

A NUSE is where the legal Estate of Lands is in a certain Person, and a Trust is also reposed in him, and all Persons claiming in Privity under him, concerning those Lands that some other Person shall take the Prosits, and be so seized or possessed of that legal Estate, to make and execute Estates according to the Direction of the Person or Persons for whose Benefit the Trust was created.

By the Rules of Common Law, he for whose Use such Person was so seized, had neither jus in Re, nor ad Rem; for if he came upon the Land, he was a Trespasser; and the Reason was, because where Lands were given to one, to the Use of another, according to the Construction of the Common Law, which is meerly upon the Words of a Contract, the Limitation of the Use was adjudged repugnant and void, because by that Law he can't be otherwife than a plenary Proprietor; and confequently he must have it to whom the Property was first limited by express Words; and by another Rule of Law no Possession could pass from one to another without folemn Livery; and tho' the Confideration was never fo valuable, if that Ceremony was omitted, nothing was transferred.

But the Chancery, that examines the Conscience, with Regard to Men's Actions, considers with what Design Agreements are made; and 'tis contrary to natural Equity, that when any Man has taken Lands to keep for another, he should deceive him, and take the Profits himself; or that a Purchaser, when he has paid his Money, should not have a sufficient Conveyance in Law executed, and a specifick Performance

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formance of the Thing contracted for, and take the Profits according to the

Agreement.

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The Original of Uses was from a Title under the Civil Law, which allows of an usufructuary Possession, distinct from the Substance of the Thing it self; and 'twas brought over to us from thence by the Clergy, who were Masters of the Civil Law, for when they were prohibited from taking any Thing in Mortmain, and after several Evasions by purchasing Lands of their own, Tenants fuffering Recoveries, and purchasing Lands round the Church and making them Church-yards, by Bull from the Pope, at last this Way was invented of conveying Lands to others to their own Use; and this being properly Matter of Equity, it met with a very favourable Construction from the Judge of the Chancery Court, who was in those Days commonly a Clergyman; and the Clergy thought this a Statute contrary to natural Juftice, and fo could eafily tolerate any Act in evading it. Thus this Way of Settlement begun; but it more generally prevailed among all Ranks and Conditions of Men, by Reason of the civil Commotions between the Houses of Lancaster and York, to secrete the B 2

Possessions, and to preserve them to their Issue notwithstanding Attainders: And hence began the Limitation of Uses with Power of Revocation. And here is to be considered,

1st, What is the Mature of Ales at Common Law.

2dly, What Alterations are made by 27 H. 8.

#### Kirst, At Common Law.

And here are to be confidered eight Things.

1. Who may be seized to an Use.

2. What are the Properties of an Estate in an Use.

3. Who may raise an Use.

4. To whom it may be raised.

5. Where, and what Considerations are necessary for the raising an Use.

6. In what Manner Uses are decla-

red.

7. The Several Sorts of Uses.

8. The Inconveniences of Uses.

1. Who may be feized to an Ase.

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To that two Things are necessary.

1. That the Person be capable of Confidence and Trust.

2. That he take it up under the Trust limited and appointed.

1. That the Person be capable of Confidence and Trust.

an Use or Trust, because they are Bodies Plow. framed at the Will of the King, and 538. are no further capable than he wills Bro. Feest, them; and 'tis his Will that they should 338. S. 10. purchase for the common Benefit, and for the Ends of their Creation, and not that they should take any Thing in Trust for others; also being incorporate, the Chancery had no Process on the Persons to compel them to discharge their Trust.

2. Aliens, and Persons attainted, are 1 Co.122. not capable of an Use, for they can Pop. 72. take for no Man's Benefit but the Rep. 382. King's.

Je, The King cannot be seized to an Pop. 72.

Use, because there is no means to Har. 468.

B 3 com-Ro. Rep.

332. Bro.

Feoffment to Uses, 338. C. S. 17.

compel him to perform; for the Chancery has only a delegated Power from the King over the Consciences of his Subjects; and the King, who is the universal Judge of Property, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Estate, as a Trustee.

1 And.

- 2. That he take it up under the Trust limited; which may be done two Ways.
  - 1. By express Words.
  - 2. By Implication.

1. By express Words; as if by the Words of the Deed a Man takes it to his own Use, or to the Use of another, there can be no Averment that he takes it as a Trustee in any other Manner; for there is fuch a Sanction given to all folemn Acts of contracting, that they cannot be construed directly contrary to their own Expressions; but that must be where the Deed is executed upon a valuable Consideration; otherwife 'tis looked upon as a fraudulent Conveyance against the Trusts, and has not the Sanction of a lawful Deed, which the Oaths of Men ought not to defeat.

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#### 2. By Implication; which is two-fold.

1. When one takes a Feoffment. having Notice of the feveral Uses and Trusts, there the Party is supposed to take it under those Uses and Trusts; for the Law will suppose a Man's Actions rather just than otherwise.

2. Where a Man takes it upon a va- 2 And. luable Consideration, there he is sup- 82. Bro. posed to take it to his own Use, for Uses 340. otherwise he would not have given an a. 5 C. 6.
Dy.340 b. Equivalent. I And.

If a Feoffee to Uses makes a Feoff- 313, ment in Fee by Deed, upon an equitable Consideration to 7. S. and his Heirs, to the Use of his Heirs expresly, 7. S. shall be seized to his own Use, tho' he had Notice of the former Trust; for where the Deed expresses the Use, an implied one cannot be averred.

A Feoffee to the Use of A. makes 30 H. 8. a Lease to B. reserving a Rent, tho' Bro. Feoff. B. has Notice of the Use, he shall be 339, 47. feized to his own; for Words of De-1 And. mise equally pass an Use as if there 314. were express Words to transfer it.

If a Feoffee to an Use makes a Feoff- 1 Co.122. ment in Fee upon a valuable Considera-Pop. 72. tion, with Notice, the fecond Feoffee shall be seized to the former Uses, for the Confideration imports a Seisin to his own

B 4

#### Uses and Trusts.

own Use, the Notice, a Seisin to the former Uses, and where the Act is capable of a double Interpretation, that must be taken which consists most with Equity.

deration, and without Notice, the Feoffee shall be seized to his own Use, for here the Act is capable of no other Construction.

and A. enfeoffs C. without Consideration or Notice, 'tis still to the Use of B. for tho' when a Man aliens without Consideration, 'tis to the Use of the Feoffor, yet in this Case it cannot be to the Use of A. because he himself held it to the Use of B.

Weg and Villers. 2 Ro. Ab. 196. A. in Consideration of natural Affection, covenants to stand seized to the Use of himself for Life, the Remainder to his Daughter for Life, with contingent Remainders over, A. reciting the Uses, grants the Reversion to F. and his Heirs expressly, but without Consideration, F. shall take it subject to the Uses, causa qua supra.

Hob. 348. J. S. seized to the Use of A. in Tail, Earl of the Remainder to B. in Tail, Remain-Ormond's der to the right Heirs of A. J. S. and A. join in a Feossment to three, two of which have Notice of the former Uses, and therein they limit new Uses, the

new

#### Afes and Trufts.

new Uses shall stand; for A. has a Power to discontinue his own Estate in Tail, and the Remainder also; which is done by this Feossment; and they cannot be re-continued by the Entry of J. S. who cannot enter contrary to his own Act. Hob. 349.

But B. will have a Remedy against 350 all the Confederates in the Breach of this Trust, viz. J. S. the Feosses that had Notice, and out of the Estate of A.

If a Feoffee to an Use binds himself Bro. Feoff. in a Statute, &c. and the Conusee to Uses, takes out Execution, he shall have it to his own Use; for the Chancery will not relieve against the Act of Law, where the Property is vested upon valuable Consideration, and with no fraudulent Design.

A Feoffee of a Manor to the Use of Bro. ib. 7. S. releases to the Tenants, they shall not have it to the Use of 7. S. for the Seigniory is drowned in the Tenancy which they had to their own Use, and there can be no Trust without an Estate

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But by the modern Course of Chan-Jackson cery, if the legal Estate be merged, and and Jackson's Case, the Owners of the Land have Notice Not Argor of the Trust, the Land is invested with 14it, and they shall be enforced by a Decree in Chancery to set it up again, for the Land was at first bound, and atten-

attendant to answer the Trust; and where the Owners of the Land knew of this Trust, 'tis Iniquity in them to destroy it.

I Rep.

122. a. 129. b. 139.

A Diffeizor, Abator, or Intruder, cannot be feized to an Use, for they take it under no Trust, but defeat the Estate to which the Trust was subjoined, and the Chancery has no Power to try the Right of Inheritance between them, for the Right of that Title is triable only at Common Law; but if he, who has the Ufe, exhibits a Bill against the Feoffee to an Use, the Chancery will order him to try the Title with the Diffeizor at Common Law.

1 Rep. 122.

If a Feoffment be made to one for Life, Remainder in Fee to the Use of J. S. and the Tenant for Life aliens in Fee, with Notice, the Alienee shall not stand seized to the first Uses; for the Tenant for Life has no Power fo to alien, and now the Feoffee is in of an Estate by Wrong, quite different from that to which the Trusts were annexed.

I Rep. 122. a. 129. 6. 1 R

122.

A Lord by Escheat shall not be feized to an Use, because he is in by Bro. Feoff, a Title paramount, and feized of an E-338. a. S. state antecedent to that to which the Use is annexed. Lord of a Villain, a Lord that enters for Mortmain, or recovers by Cessavit, or a Tenant by the

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the esie Curtefie cannot be seized to an Use, for they claim by the general Laws and Statutes of the Kingdom, which the Chancery has no Power to alter, and do not take as Substitutes under those private Contracts, to which Trusts are annexed, and so cannot be punished as corrupt Breakers of that Trust which they never undertook.

But a Tenant in Dower may be seiz-Hard. ed to an Use, for a Tenant in Dower 469. Co. Lit. claims by the Marriage Agreement, 239. and a sufficient Provision is made for I Rep. her by Law, which is a third Part of Bro. F. to his Estate; and since a private Con-Uses, 338. tract is the Original of her Title, she S. 10. continues the Estate of her Husband as he purchased it, and under the same Trust and Agreements.

An Occupant may be seized to an Hard. Use, for an Occupant continues the E-468. State of Tenant for Life, as his Substitute, and so must take it as he had it. 338. a.

Tenant in Tail cannot be feized to C. L. 196. an Use, for the Land is by the Act of Cro. Jac. Parliament appropriated to Tenant in 400. 2

Tail and his Heirs; so that the Chan-Ro. Ab. 780, 1. cery, which is bound by the Act of Ro. Rep. Parliament, cannot turn it to any other 313.

Purpose.

Bro. F. to Uses 338.

a. S. 10.

last and As could be a bould Where

the Remainder in Fee to the Use of another, and he in the Remainder enters and disseizes the Tenant for Life, he takes the Estate as a Disseisor, and is not capable of taking any Estate after the Trust ended, for he cannot be remitted contrary to his own Act.

Trust, commits Treason, whereby the Term is forfeited to the King, the King is not subject to that Trust, for he is in the Post, and the Law disposing the Property of all Criminals to the Use of the King, he cannot take it under the Trust limited.

Pop. 72, Where there is a Tenant for Life, the Remainder to A. to the Use of B. and the Tenant for Life makes a Feossment in Fee, and A. releases to the Feossee, the Use is gone for ever, causa qua supra.

Hard. If Mention be made of Persons in the 469. Post, it seems, by the Opinion of the Lord Hale, they shall be liable to the Trust.

Bro. F. to If a Man grants a Seigniory to A. to Uses, 338. the Use of B. and the Tenancy Escheats, A. shall hold the Tenancy to the same Use; for a Seigniory supposes an old Property after the present Fee is determined, and since A. has taken

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it up to the Use of B. when the Tenancy comes in, he shall have it to those Uses to which the Property was at first granted.

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Where Feoffee to A.'s Use vouches and recovers Land in Value, he shall be feized to his first Use, for the Recompence must ensue the Loss, and Cestury que Use lost his Use by the Recovery.

Where A. Feoffee to the Use of B. Bro. F. to grants a Rent to C. having Notice of Uses, 337. the Use, the Rent shall be to the Use 14 H.8.4. of B. for A. has the Freehold in him, and now at the Common Law may raise a Freehold out of it, but he has the Fee in Trust, and so in Conscience cannot raise a Freehold but under the fame Trust; and fince in that Case he gave Notice of the Trust, he has created the Rent under the Trust according to his Power; and fo if A. makes a Feoffment to D. without Notice, and B. releases to D. after the Stat. of R. 3. and before the Stat. of H. 8. this did extinguish the Rent; for by that Stat. the Release of Cestuy que Use is an Act sufficient to convey the Freehold of the Rent, and so 'tis merged in the Land.

But if Feoffee to a Use grants to Bro. F. to 7. S. a Way or Common for his Beafts, Ufes, 338.

Ibid.

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this, ex natura rei, cannot be but to the Use of the Grantee.

Bro. F. to The Feoffee to an Use may grant Uses, 339 the Office of a Steward, Bailiff, Receiv-S. 27. er, etc. for he is the Instrument to convey the Profits to Ceftuy que Use, and now it may be in his Power to appoint all Means in order thereunto; but this it feems must be by the Consent ibid. of Cestur que Use; for this Appointment is wholly to convey the Profits to him.

Bro. F. to But during the Minority of the Heir Uses, 339 of Cestur que Use, all Feosses may S. 27. grant fuch Offices without his Affent, for the Law supposes a tacit Consent when 'tis for the Benefit of the Infant.

But they cannot fettle Fees to fuch Officer during Life, without the Assent of the Infant when he comes to his full Age, for that may be to his Prejudice.

A Feoffee to a Charitable Use makes Car. East- a Feoffment upon valuable Consideration, and without Notice, the Purchafer shall not be seized to a charitable Use, nor any Persons claiming under Char. Uses 60,61,62, him, tho' they have Notice; for he is expresly excepted by the Statute, and the Lands once discharged are never after chargeable.

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But if the Fcoffee to a charitable Hill. 11. Use makes a Feofiment to A. for a va-ton and luable Confideration, and without No- Coletice, and A. enfeoffs B. for a valuable field's Confideration, without Notice, B. shall Herne be feized to the charitable Use; for the 135, 136, Words of the Statute are, that the Com- 253, 254, missioners shall come and order the Lands and Tenements to be employed according to the Party's Intent, fo that the Statute appropriates the Lands to the charitable Uses in the Hands of A. and B. his Substitute takes it under the Charge, and in fetting forth the Title how he has obtain'd them, he must shew the original Purchase which was under the Charge.

If a Man gives Land to A. and a Peacock Rent out of it to charitable Uses, B. and Shewpurchases the Land, with a good Con- Car. Mic. fideration, and without Notice, he shall Herne hold it charged; for first the Rent is Town of not extinct by the Purchase, because ap- Woodpropriated by the Statute to the cha-ford and Pockm. ritable Use, and so cannot be merged Hill. 14. according to the Rules of Common Car. Law while the Charity continues.

2. 'Tis not within the Exception of Ed. 174 the Statute, for that extends only to the Purchasers of the legal Estate to which the Charity is annexed, and B. has purchased the legal Estate of the

Land

Land and not of the Rent, for these are as distinct Rights in A. as if they had been in different Persons.

- 2. 'Tis to be considered what are the several Properties of an Estate in an Use.
- 1. If an Inheritance be purchased, 'tis descendible to Heirs at Law, and here 'tis to be considered,

I What are the Descents of an Use in Possession.

2. What is the Descent of an Use in Reversion.

1. Of the Descent of an Use in Possession. If an Use be limited to a Man and his Heirs, the Court of Chancery will direct it to go to such Persons as the Common Law has appointed to represent him; for the Chancery cannot alter the common Import of Words, or set up Rules of Property

Words, or fet up Rules of Property opposite to the Rules of Law; for there is no legislative Power in the Chancery; and to abrogate and set aside Laws, is equal to the Power of making Laws.

There is possession fratris of an Use, for Rep. 22. the Rules of Inheritance govern in Chan-

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Chancery; now none can make himfelf Heir, but he that represents the Perfon that was last in Possession; for he that last possessed it had the entire Dominion and Property, which none else can have but by standing in his Place; and no Man can stand in his Place but one of the whole Blood.

If Lands descend on the Part of the Co.E. 13. Mother, and the Party makes a 2 Ro. Ab. Feoffment in Fee, without Confidera- Dy. 179. tion, or referving this Use to him and Co. L. 22. his Heirs, the Use shall descend to the licet Hob. Heirs of the Part of the Mother; for 31.Dy. the Land would have gone to the 134 contr. Heirs of the Part of the Mother, and Uses, 338. a Use is but an Estate in Equity, Part a. S. 10. of the Estate in the Land; for the Rule of Law that tends to the Establishment of Families and Encouragement of Industry, is, that those that take Benefit as Representatives should convey it all along in the Blood of the first Purchaser, from whom the Benefit was derived, and the Use and Possession was derived from the Mother, and the Use was never parted with, but the Posseffion only; fo the Use must be all along conveyed to the Heirs on that Side.

If a Man for a valuable Considera-Bro. P. to tion purchases Lands, or the Use of Uses, 331-them, to himself, yet they shall de-1 Co. 190.

fcend to his Heirs; for there wants not the Word Heirs to create an Inheritance in an Use; for 'tis Equity that a Perfon, who gave a Consideration for the Fee, should have it; and that is not fetting up any other Rules of Property opposite to the Rules of Law, but mitigating and dispensing with the Rules of Law, in particular Cases, where they should happen to shelter Dishonesty and Oppression: But now since the Statute, no Inheritance can be raifed without the Word Heirs, because now the Uses are transferred into Posfession, and must be governed by the Rules of Possessions at Common Law, as to the Words that create new Estates.

The Possessio fratris of an Use follows the Analogy of Descents at Law; and so if a Man seized in Fee of an Use, had Issue a Son and Daughter by one Venter, and a Son by another Venter, and devises it for Years, and dies, and the Son dies during the Term, the Daughter shall have it, and not the Son; otherwise it had been if he had devised it for Life.

As the Court of Chancery cannot alter the Descent of the Land, so it can
5 Ed. 4.7 not alter the Law and Custom of a Dy. 179.

2 Ro. Ab:

786. C. L. 23. 13 Co. 56. Hob. 31. Dy. 134 contra.

Cro.Eliz

Place of for all immemorial Ulages are s not Part of the Laws of the Land ! And fo tance if a Man makes a Feofiment in Fee of Per-Lands in Gavel-Kind, or Burrough Enr the glish, without a Consideration, to the Use of the Feedfor and his Heirs, this perty Thall go to all the Sons, or to the Br. 339.S. t miyoungest, according to the Custom. 32. Rules If there is a Custom, that Lands shall 2 Ro. Ab. vhere isho-

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go to the eldest Daughter only, and 180. the Party makes a Feoffment in Fee Jones and to the Use of him and his Heits, the Romby. Use shall go to the eldest Daughter.

2. Of Descents of a Reversion which are governed by these Rules. there as belogged so them

First, Where a Man has an Estate in afelf, and limits an Estate to his Right Heirs, he is feized of the whole F.state.

In the same Manner, where a Man i Vent. has a Use in himself, and limits a Use 380. to his own Right Heirs, the same Use is in him still. The Reason is, because Ancestor and Heir are Correlative; and so whoever represents me as to my Estate vested in him after my Death, I reprefera him during my Life as to that Enate; and confequently giving an Estate, already in me, to my Heir, is not departing with it; for tis a Dif-C 2 polition

1 Vent.

1278, 9.

137. A.

627. Dy. 156, position in other Words to my self, and fo all Things remain in flatu quo.

But where I limit a Ufe, already in me, to my own Representatives, and add a Qualification to those Reprefentatives; tho' this be not L parting with the Estate, because these are not Words to convey it out of my felf, yet there is an Alteration of the Engle in my felf, and the Use shall alter and defcend to my Heirs that came under 1 Co. 47, that particular Distinction and Qualification; because the Use has always Co.L. 22.b. been changed and modified according Hob. 27. Mod. to the Intent of the Parties that have 96. 1 Ro. Ab. the Interest; and such a particular E-827, 841. state shall be supposed in them, as may best answer the Intent, ut res valeat. If a Man seized of Lands in Fee, 237, 362.

makes a Gift in Tail, or a Lease for Life, Remainder to his own Right Heirs, they take by Descent, as in the

old Reversion.

If A. feized of Lands in Fee, grants them by Fine, during his own Life, the Remainder to his own Right Heirs, the Reversion is in him, and he may grant it.

A Fine sur Conuzance de Droit que Dy. 237. il et sa Feme ad de son done to the Husband, with a Remainder to the Conusor, for Life, Remainder to the Right

Right Heirs of the Husband, they are in the old Reversion, and the Wife surviving shall have it for Life.

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If a Man makes a Feoffment with- e. of Bedout a valuable Consideration, to the ford's Use of himself, for fifty Years, the Pop. 3. Remainder to B. in Tail, the Remain- 1 Co. 130. der to his own Right Heirs; the Feoffor Moo. 718, is in the old Reversion, and he may devise it; for a Feoffment without Consideration does not dispose of the Use thereof; the old Use is in him still.

But it hath been held that if the Co. Lit. Feoffment were made upon a valuable 22.b.23.a. Moor Consideration, in as much as that is a 720, 721. Disposition of the Use, there is an E-state in the Feosses to retain it till the Death of the Feosses; and this is an Estate of Freehold, and affords a Tenant to the Precipe, and an Estate to support the contingent Remainder.

If a Man covenants to stand seized Pybus to the Use of his Heirs, begotten on a and Mitsecond Wife, that is an Estate in Tail, 1Mod.98, vested in the Ancestor.

121, 122,

2. Where a Man limits an Estate of Bro. F. to Freehold to me for Life, with a Re-Uses, 338. mainder to my Heirs, tho after never so 1 Ven. so many particular Estates, the Re-from 372 mainder is vested in me for three Reas to 382. sons,

C 3 First,

First, Because otherwise you construct the Grantmost in Favour of the Grantor, and let him in to the Reversion during the Contingency, to punish Waste and enter for the Forseiture.

Secondly, Because the whole Advantage must be intended to me when I am first named to take the same Sort of Estate in the Conveyance, and the Benefit is not defigned to any other particular Conveyance, but to all other Perfons that bear the Character of my Representatives; fo that the Limitation is for my Sake, and only intends to enlarge my Estate after the particular Estates are worn off, yet cannot be construed in the same Manner as where an Estate is limited to A. the Remainder to the Right Heirs of B. because there is nothing in the last Case to lead the Mind to fuch an Interpretation; for here is no Benefit originally defigned to B. but to his Heir primarily; and so the Heir takes as a Purchaser.

But if the same Sort of Estate be not limited to the Ancestor as to the Heir, the Heir must take by Purchase; for it is plain the Donor designed him an original Benefit, quite different from what he designed the Ancestor.

Thirdly, Because when the particular Estates are worn off, they are as if they

had never been; and so the Heir should claim by Descent, as in his better Title, and as of the Dying seized of his Ancestors.

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Another Reason of this Law is, because it must be a contingent Remainder, or a Remainder vested; but it could not be a contingent Remainder, because of Necessity it must be in the Ancestor, and the Person that represents him, and so construed a Remainder vested.

If J. S. makes a Feoffment to the Co. Lit. Use of A. for Life, the Remainder to  $C_0$ , 91. b. B. in Tail, the Remainder to the Right Fenwick Heirs of A. the Remainder is vested in and Nutford.

A. and his Heirs claim by Descent.

Mo. 284,

But if 7. S. makes a Feoffment to 5, 720. the Use of A. for a Term of Years, the Cro. Car. Remainder to B. in Tail, the Remain-Co. Lit. der to the Right Heirs of A. the Re-22. b. Moore mainder is not vested in A. but his 720. Right Heirs take by Purchase.

If an Estate be limited to A. for I And. 70. Life, Remainder to the Heirs Males of I Co. 104. the Body of A. and to the Heirs Males of such Heir Male, there is a Trust excuted in A. because this is within the Rule; for here an Estate is limited to A. for Life, with a Remainder to his Heirs; and so the Word Heirs is not a Name of Purchase but Limitation.

C4 But

1 Co. 66, 67. Co. Lit. 22. b.

But if an Estate be devised, or per Hale, be conveyed to A. for Life, the 11H.6.13. Remainder to his next Heir Male, and to the Heirs Males of the Body of fuch Heir Male; there is an Estate only for Life in A. and a contingent Remainder in his Heir, as a Purchaser, which vests eo instanti that the particular Estate determines; for tho' there be an Estate for Life in A. yet the Remainder is limited to his Heir only, in the fingular Number; and Heir in the fingular Number only, is a Word of Purchase, and not of Limitation.

Co. Lit. S. b.

If an Estate be limited to a Man and his Heir, he has only an Estate for Life; for it cannot go in perpetual Succession, because no more Representatives than one only is expressed. The Heir cannot take by Way of Remainder, because it is limited by a Conjunction Copulative; and as Jointenant he cannot be, because nemo est Hares viventis.

Co. Lit 8. 6.

But if a Man devises an Estate to a Man and his Heir, a Fee-simple passes, and Heir there is taken as nomen collectivum, to answer the Intent of the Party, which appears to be, that he intended to pass a Fee, as if it had been limited to the Devisee and his Heirs for ever. But

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rs for But But if an Estate be devised to A. 2 Vent. during the Life of B. in Trust for B. 311, 312. and after the Decease of B. to the Heirs Males of the Body of him the said B. now living; that is a Remainder vested in the Heirs of B. for Heir now living, in that Devise, must be taken as a Periphrasis of the Heir apparent, who is called Heir in Law, as may be observed by the Words quare filium G Haredem rapuit.

2. A Feme is not dowable of an Use, 1 Co.123. for the Privilege of Dower was only to b. 4. Freeholders Wives; now an Use being 1 Ch.Rep. no Freehold, is not within that Law, 152. and the Chancery allows the Feoffees to be seized to no Body's Use, but those that are particularly named in the Trust.

And that being the Case, it became 4 Co. 1. 5. a Practise; so the Father and Friends of the Woman, procured the Husband to take an Estate from the Feossees, or others seized to his own Use, for Life; and then to the Use of his Wife, for Life, before or after the Marriage; which was the Original of Jointures.

Nor can the Husband be Tenant by 4 Co. the Curtesie of an Use, causa qua supra. 123. 4.

3. An Use is alienable, 1st, at Common Law, 2dly, by the Stat. of R. 3.

a Dower was annexed to it, to alien the Lands.

Allen 16. I. At Common Law, Cestuy que Use Plow. might alien the Use, because every one may dispose of the Rights that were in him; or he may prefer a Bill in Chancery to make the Tertenant exe-

cute the Use in himself.

But at Common Law, if Cestur que Use had entered and made a Feoffment in Fee of the Lands, this had not been good to pass the Estate to the Feoffee; because Cestur que Use had not the Freehold in him, and so could not pass it to another; but by his Entry he was a Disseifor: Yet in this Case, if the Feoffees of Cestur que Use had reentered upon the Purchaser, the Feoffees would not have had the Lands to their own Use by the original Trust; and they would not have stood seized to the Use of Cestur que Use, because he had transferred the Use to another.

If Cestur que Use makes a Lease for Years, rendering Rent, the Reservation is void, unless it be by Deed; for the Rendering Rent to a Man is an Acknowledgment of the holding Lands from him; but here the Lands are not held of Cestur que Use, but of the Feoffees who have the Reversion. But if the Reservation be by Deed, the Feof-

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Plow. 352. b.

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ment been ffee; the

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not eofit if eoffees fees are estopped by their own Act to Bro. F. to Uses, 338. deny the Tenure of Cestur que Use. S. 23,359. If Cestur que Use may make a Let- 26.

ter of Attorney to give Livery, Quare; Bro. F. to or if the Act confines it to the Act of S. 28.

Cestury que Use.

2. By the Statute of 1 R. 3. c. 1. a Power was annexed to a Use, that Cestur que Use should alien the Lands.

The Reason of that Statute was, because Cestury que Use in Possession often aliened the Lands, and then the Feosses entered, which caused a great deal of Vexation and Chancery Suits; and so the Statute gave to Cestury que Use an immediate Power of Alienation, without the Concurrence of the Feosses.

First, Who are within the Statute.
Secondly, What Authority is given by
it.

no Power of Alienation, when he has 351. b. 1. a naked Right to a Use, and not a Use in Esse; unless it be in order to confirm an Estate in Being; because the Intent of the Statute was only to give Cestuy que Use a greater Power, and to transfer his Estate, and not any other Remedy to regain and revest it; and unless he has the Use, he cannot pass

the Use, much less the Possession to another: And fo if A. feized of Lands to the Use of B. enfeoffs 7. S. and dies without Issue, C. has no other Way of regaining the Use but by the Entry of the Feoffee; and he has no Power to alien by this Statute till the Use be revested.

But if the Feoffee to a Use in Fee Plow. be diffeised, and Cestuy que Use releases 351. 6. 1. to the Disseisor, this extinguishes the Use, and by the Statute bars the Entry of the Feoffee.

Where Feoffees to an Use are Dissei-Uses, 331. sees, and after the Disseisor enfeoffs
b. S. 8. Costant and Illa who enfects Bro. F. to Cestur que Use, who enfeoffs a Stranger; 27 H.8.29. this is good, and shall bind the Feoffees; for the Feoffment is good to pass the Possession, and Right of the Use, which he had in him; and the Feoffees cannot enter to revive an Use, which the Party himself by his own Act has extinguished.

> 2. The Statute is to be understood of Cestur que Use, that has an Use in Esse, in Opposition to him that has only a Re-

version or Remainder of an Use.

Plow. If a Feoffment be made to the Use 350. of A. for Life, Remainder to B. in I Co. 122. Fee, A. may alien in Fee, because the Feoffees claim the whole Estate for the Use of A. during his Life, and he

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bas the whole Advantage of it; and the Statute that gives the present Possessor of the Use a Power of Alienation, has provided an immediate Remedy for the Remainder Man.

But if the Tenant for Life of an Use Plow. aliens in Fee, and dies, the Feosfees 348. Delamer may enter on the Alienee; for by the and Bar-Words of the Statute, the Alienation rard's is good against Cestury que Use and his Point re-Heirs, and Persons claiming only to his solved.

Use: So when Feosfees claim to the Use of the Remainder Man, the Feosfment of Tenant for Life, according to the Authority given by the Statute, is no longer valid to bar the Feosfees of the Entry; for their Right is by the Common Law.

But if there be a Feoffment in Fee Plow. to the Use of A. for Life, the Remain-250 b. der to B. in Fee; B. has no Power of Bro. Feeff. Alienation by the Statute, during the 339 b. 44. Continuance of the Estate for Life, 1 Co.128. because the Possession is, as is said, to the Use of A. only, during his Life, and so the Remainder Man has nothing to do with the Possession; and if the Remainder Man would enter on the Feoffees and make a Feossment, either the Use of Tenant for Life would be destroyed, or the Feossession must re-enter and create a particular Estate to themselves.

selves, without being subject to Dower; for by the Common Law, every particular Estate is derived out of the Fee Simple by the Agreement of the Parties in Interest; but here are no Parties to fuch Agreement, and the Statute has not altered the Law in this Cafe.

Ibid.

But if there be a Tenant for Life, Remainder in Fee, he in Remainder may make a Leafe for Years, or grant a Rent-Charge to begin after the Death of Tenant for Life; for he cannot enter and take the Possession out of the Feoffee; but 'tis an Executory Contract on which the Statute operates after the Death of Tenant for Life.

Tenant for Life to the Use of A. and the Reversion is granted with Attornment to another, to the Use of B. for Life; the Reversion in Fee is granted to a third, to the Use of C. B. and C. may grant their Estates presently, because there is a Division of Estates, and each has a Tertenant of his own; so that the transferring one Estate does not dispossess another Tertenant, or make any particular Estate than what is created by the Parties.

A Feeffment to the Use of A.T. Remainder to the Use of B. in Tail, Remainder to A. in Fee, A. makes a Feof ment

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f A.T. ail, Rea. Feoffment ment to the Use of himself, for Life, the Remainder to his eldest Son in Tail, and then the Statute of H. 8. is made, and the Father dies; the first Feosfees may re-enter, and revive the former Use; for A. could only make a Feosfment in Fee determinable upon his own Life; but as this Contract must be taken strongest against them, 'tis a Disposition and Alteration of the Remainder in Fee, according to the Uses limited.

2. What Authority is given by the Statute.

of charged which eidenmite he If a Lord or Grantee of a Rent, be Co. Lic. also Cestur que Use of the Land, and 52. a. makes a Feoffment in Fee according to this Statute, the Rent is extinct; but if the Tertenant gives a Letter of Attorney to the Lord or Grantee of a Rent-Charge, and he makes a Feoffment accordingly, this does not extinguish the Rent; for in the first Case he passes also his own Interest and Estate in the Land; But in the last Case he himself passes nothing, for he is but substitute to another, and the Estate passes only from the Tertenant. I will all the many Title he Ting, or farer a Receivery, this is

Co. Lit. If Ceftuy que Use makes a FeoffBro. F. at ment in Fee upon Condition, and afUses, 338 ter enters for the Condition broken,
he shall be seized of the Estate in the
Land; for the whole Estate is divested
out of the Feoffees by the Feoffment,
and they cannot enter for the Condition
broken, because no Parties to it.

This Statute does not give Ceftuy que Use any Power to devise the Land; for there are no Words that alter the

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Law in that Point.

D. 143. If Cestur que Use in Tail, aliens the Bro. F. al Land by Lease and Release, or Feosf-s. 219. ment; this only binds the Feossees du-37H.8.13 ring his Life, because he has no longer Power of Alienation; vid. the Stat. If this Cestur que Use aliens by Fine, this is good, and bars the Entry of the Feossees after his Death; for that would disposses the Estate in Tail by the Stat. of 4 H. 7. and if he aliens by Recovery, it does not bind the Issue,

rbid. S. 7. because he is not Tenant to the Precipe; so that would be no Bar at Common Law, and this is not helped by any Statute: For tho a Recovery here be expressly mentioned, and so binds the Party himself, yet the Right of the Estate in Tail is severed.

1 Ch.Cas. If Tenant in Tail of a Trust, levy a 49, 213. Fine, or suffer a Recovery, this is an equi-

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equitable Bar of the Estate, tho' the Trustee does not join in the Recovery to make a legal Tenant to the Pracipe; for as the Fine and Recovery pass the Entail in a legal Estate at Common Law, fo it passes the Entail of a

Trust in the Court of Equity.

But if Tenant in Tail of a Trust , Ch. Cas. makes a Mortgage, or acknowledges 119, 120. a Judgment or Statute, and then levies a Fine and fettles a Jointure, the Jointress shall hold it subject to the Mortgage or Judgment, in the fame Manner as if the Mortgagor or Conufor had been Tenant in Tail of the legal Estate, and after the Mortgage or Judgment had levied a Fine and made a Jointure; because the subsequent Declaration of the Use of the Fine is meerly the Act of Tenant in Tail, and he cannot by any Act of his own make a fubsequent Conveyance take Place of a precedent; and the rather because the Feme claims under that Fee which Tenant in Tail got by the Recovery or Fine; and that Fee was subject to all the Charges he had laid upon it.

If a Man recovers by an erroneous Bro. F. al Judgment, and makes a Feoffment to Uses, 337. his own Use, and upon a Writ of Er- S. 3. ror the Judgment is reversed, the Party 26 H. 8.2.

shall enter without a Scire facias against the Feosles; for this is within the Letter of the Statute.

Bro. F. al. If Cestary que Use makes a Lease Uses, 337 for Years, reserving a Rent, he shall s. 6. 27H.8.13. have an Action of Debt upon the Contract; but he shall not avow, because the legal Estate of the Reversion is still in the Feossees, since he has put the Estate out of them but for a Term; but the equitable Estate is in him, and he may dispose of it, and the Rent passes; but the Feossees shall punish for Waste done by the Tenant, and enter for a Forseiture, &c.

Bro. F. al If Cestur que Use makes a Lease for Uses, 338. Years, reserving a Rent, this shall s.23,339. go to his Heirs; for since the Statute B. F. al Uses has given him Power to make Estates 338. S.18. at Law, they are governed by the

Rules of Common Law.

B.F. al Us. If Cestur que Use makes a Lease for Years, reserving a Rent, with a Clause of Re-entry for Nonpayment of the Rent, and the Rent is behind, Cestar que Use may enter; for he only can take Advantage of his own Condition. And since the Statute allows the Act of Re-entry by allowing him Power to make Leases, he shall for ever keep the Possession against the Feosses. Quare tamen.

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clause of the Cestury aly can addition he Act Power or keep eossess.

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#### 4. A Afte is devisable.

For the Reason why Lands were Treatise of not originally deviseable, was, because Tenures the Ceremony of Livery was required 1 Co. to the Transmutation of the Possession, 123. b. which is not Necessary to the Disposal B.F. al Us. of an Use; for Livery is to give No-H. 8. 8. time against whom the Pracipe is to Doct. and be brought, and the Pracipe is only 22. H. 8. of an Estate of Freehold.

If a Man makes a Feoffment in Fee 6 Co. 18. to the Use of his last Will, the Feoffor Co. Lit. has it to the Use of himself and his b. 272. b. Heirs; for until a Man has actually Buls. 200. disposed of the Use, the Use is in him 10. only: It is so in this Case; and if he Semain's devises, the Parties must claim their Case. Interest by the Devise.

But if a Man makes a Fcoffment in 6 Co. 18. Fee to the Use of such Person and b. 272. b. Persons, and of such Estate and Estates as he shall appoint by his last Will; there by the Words of the Conveyance he has a qualified Fee, determinable upon the Limitation of other Estates; and the Fcoffment mentions the suture Estates that shall rise on his Denomination, which plainly conveys an Executory Fee to the Persons nominated; and 'tis only the Office of the Will to

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nominate; for the Interest is transferred and disposed of by the Feoffment. But in the former Case there is in the Feoffment no Words of Disposition, Cc. and there the Parties must claim by

the Devile.

If a Copyholder furrenders to the 4 Co. 23. i Leon. Use of his last Will, the Land is still 174. in the Copyholder, and he may dispose of it by an Act in his Life-Time; if he does not, by any Will, it shall go

to his Heirs; if he makes a Will, it passes by the Surrender, and not by Cro. El. 441, 2. the Will; for the Property of the Copyhold is not altered by a private Act of the Tenant, but by an open and folemn Act in the Lord's Court; but at Common Law the Use of the Land may pass by a Devise, as is said; and the Freehold it self since the Statute.

If a Man fuffers a Recovery to the 6 Co. 18. Hob. 349. Use of his Last Will, he may dispose of the Estate by a Conveyance de novo during his Life; but he cannot, during his Life, limit new Uses on the old Recovery, fo as to be thereby bound from any Alteration; for the whole Interest of the Recovery was declared to be to the Use of his Will, which is changeable in its Nature.

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A Man makes a Feoffment in Fee B.F. al Uf. 337. f. 79. to the Use of his Last Will, and in the

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the Deed he expresses the Use of the Will to be to himself for Life, and then to his Son in Tail, and afterwards makes a Lease for Years, and dies; this shall bind the Son; for it being expressly declared to the Use of his Will, it supposes a Power in him to change it.

Cestury que Use devises, that his Feof-B. F. 338. fees may alien the Land to J. S. the S. 12. Feossess may enseoff B. and B. may

alien to J. S.

Cestuy que Use devises, that his Feof-Ibid. fees should alien the Land for Payment of his Debts, the Creditors may compel him in the Court of Chancery to do it.

If Cestury que Use devises, that his Ibid. Feosfees should alien the Land, this is in the Heir till Alienation.

### 5. 'Tis not extendable or Assets,

Because there is no Process at Law Rep. 1. but upon Estates at Law; and Uses are B.F. alus. meerly Creatures of Equity, on which 339.S. 25. the Common Law can award no Exe-1Ch.Rep. 14, 128. cution; and they are not Assets, because they go in the Course of Inheritance, and not to Executors.

But if a Term be limited to attend Hard. a Fee, this shall be Assets for the 489. Payment of just Debts; for the Court of Chancery will not carry it out of its

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due Course, where there is any Preju-

But by the Stat of R. 3. 'tis held extendable upon a Statute Staple or Merchant; for this is in the Nature of a B.F. alv. Grant, or Leafe for Years; and Grants 339. S. 25. of Leafes are made good against Cestuy que Use and the Feosfees, by the Statute. I Chan. But since the Statute of Frauds and Rep. 128. Perjuries, they seem to be Assets in the Heir for the Payment of just Debts, the Heir being obliged to pay all just Debts out of a real Estate that descends from the Ancestor.

### 6. Tis not forfeitable.

Hard.

1. Not for Felony; for in Case of 466,7.
488to 489. Felony the Lands are cast on the Lord B.F. al Us. of whom they are holden, for Want 339. S. of Heirs; but a Use is holden of no Body.

Hard. 2. Not for Treason; for all Tenures 492, 495 are forfeited by the Breach of Fidelity and Duty owed to the Lord; for under that Condition the Tenants take their Estates, and consequently all Breaches of Allegiance forfeit the Estate to the King, since it originally came from him, consequently the Estate which is holden may be forseited; but

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this is alter'd by the Statute.

If a Term be limited in Trust, and 26 H. 8. Cestuy que Trust commits Treason or H. 8. c. 20. Felony, the Term is forfeited; for the Sir John personal Property goes with the Persons; Case. when the Possession is forfeited, the Par- Allen 16. ty is incapable of personal Property, Holland's Case, ib. and consequently the Right is in the Stile', Re. Publick, and the King has the Use of 44. Hard. the Term in this Case.

But if a Term be limited to attend Hard. the Inheritance in Trust, it is not for-467. feited for Felony, because it does not vest in his Person and go to his Executors, but belongs to the Inheritance, like the Charters which are not for-

feited.

# 3. Who may declare of raile the Ales.

1. Since the Chancery, as hath been faid before, does not fet up Rules of Property contrary to Rules of Law, those that have not a disposing Power by the Law, cannot raise a Use; and consequently a Husband and Wife cannot declare Uses upon a Feofiment, fo as to bind the Wife.

But Baron and Feme may levy a Mo. 197. Fine which will bind the Wife; for 2 Co. 57.4. here 2 Ro. A. D 4

here the Law allows her a disposing Power, because she is privately examin'd, confequently the Chancery must allow them to declare what is the Defign of that Fine; and therefore fuch Declaration by them both shall bind the Wife.

\$ Co.57.4. Ro. Abr. 798,

If the Husband only declares the Uses, this shall bind the Wife; for fince she joins in the Fine, she must be prefumed to concur in the Defign of that Fine, unless the contrary appears by some manifest Sign of her Dissent.

2 Co. 57. Beck-Quære ration be

b. 58. b.

But if the Husband declares the Moorigo, Uses of the Fine one Way by Deed, and with's Cafe. the Wife another by Deed, this binds the Husband during the Coverture, but the Decla- not the Wife afterwards; for the Hufband cannot declare the Uses without not meerly Concurrence of the Wife, because he 2 Co. 57.a. has no Estate; and she cannot be prefumed to concur where the contrary appears by her Deed; and she cannot declare the Uses alone, because during Marriage she is not fui juris; and without the Husband she has no disposing Power: And if there be no Use declar'd upon this Fine, it is to the Use of the Wife; for where there is no other Intent of a Fine declared, it is suppofed to be design'd as a farther Security

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to the present Possessor; and the Use is still in the Wife, since in this Case she has not departed with it.

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If Husband and Wife fell the Lands 2 Co. 57for Money, and levy a Fine, the Uses Moor ib. may be averred without any Deed 798.

from the Wife, to prove her Assent.

If Baron and Feme levy a Fine, and 2 Ro. Ab. there be an Indenture in the Name of 798. L.T. the Husband and Wife, declaring the Uses, which is brought to the Wife to seal, and she refuses, the Uses do not bind the Wife; for the cannot be prefumed to concur after fuch a Refu-

If Baron and Feme, within Age, 2 Ro. Ab. levy a Fine, this shall bind her; for 798. tho' an Infant ought not to levy a Q. whe-Fine, yet when done it is valid, because ther the there is no Averment against Records; Fine be not reversable and if the Law allowed it to be valid, for the it is reasonable the Parties should have Nonage of Power to declare the Intent of it. during ber

Baron and Feme levy a Fine of the Nonage; Land of the Wife, and both feal an refolved it Indenture; and in Consideration of El. 129, Money, limit the Use to the Conusee, 200.57.6. and there is a Clause of Re-entry upon Payment of the Principal and 10 per Cent. which is more than the lawful Interest, whereby it becomes an Usurious Contract, because the Parties enjoyed

joyed the Profits of the Land; besides, if the Husband afterwards, and before the Fine be engrossed, rectifies it, and explains their Intention by another Deed, wherein the Conusee covenants, that the Baron and Feme should take the Profits in the mean Time, although the Wife does not agree to the second Deed, it shall bind her; for the sins Deed declares the Intent of the Fine, and passes the Uses, and the last Deed only declares the Intent of the first to rectify the Matter of the Usury.

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clare the Use of a Fine levied, causa

qua supra.

dispose of the Use according to the Estate and Interest he has in the Land; and therefore if two Jointenants levy a Fine, and declare the Uses severally, each Man disposes of his own Moiety; but if they declare no Uses, they are seised as before.

If Tenant for Life, and he in Remainder in Fee join in a Fine, without declaring any Uses, they are seifed

as they were before.

A. seised of certain Lands, and B. a Stranger join in a Fine, it shall be to the Use of A. for since there is no Con-

Consideration to part with the Land, the Use is still in him.

So if A. feized in Fee of certain 2R. Ab. Lands, and B. a Stranger joins in a 789. Common Recovery, without declaring any Uses, the Use shall arise to him that had the Interest in the Land, and not to the Stranger.

# 4. To whom a elle may be raised,

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An Alien could not compel the Feof-Al. 16. fees to execute a Use; for 'tis contra-B.F.al Us. ry to the Policy of the Law that an 29.

Alien should plead, or be impleaded, Style 21. touching Lands, in any Court of the

The King shall have the Use of an All. 16. Alien upon his Purchase; for the Ad-Sty. 40. Wantage a Man receives from his Duty 195. can extend no farther than the Obligation of that Duty reaches, but the Allegiance of an Alien is temporary, therefore so is his Property; and since he is incapable of Perpetualness of Subjection, he cannot be protected in any Estate that is of perpetual Continuance; and the Inconvenience is the

same if this be a Breehold at Law, or

But

But in this Case the King shall not seize the Land of an Alien, unless it be executed in him by a Decree in Chancery; for there was no Right in the Cestury que Use to seize the Lands without a Decree, and the King has only the Rights of the Cestury que "Use. Q.

B.F. al Us. Secondly, Tho' the King cannot have 338. a. Feoffees to his Use, because he cannot take but by Matter of Record; yet he may take it when the Use is found of Record, where an Office is found of

the whole Matter.

B.F. al Uf. Thirdly, A Monk cannot have a Use, because he has vowed perpetual Poverty, and therefore cannot have Property; but he may be an Executor, because

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possessed to another's Use.

Fourthly, The Limitation of a Use 8 H. 7. 8. B.F.al Us to the Poor of the Parish of Dale, is 339 a. good, tho' no Corporation; for tho' S. 29. Mich. 10. they are capable of no Property at Car. Elf- Common Law, in the Thing trusted, Warren. because the Rules of pleading require 6 Jac. Ha: Persons claiming to bring themselves flings and under the Gift; and no indefinite War-Multitude, without publick Allowance, wick. 132, 142. can take by a general Name, yet they are capable of a Trust; for here the 33 H. 8. Complainants do not derive to themselves 1 Co. 23, any Right or Title to the Estate, but shew

show that it has been abused and misemployed by the Owners, contrary to Conscience.

Fifthly, Where and what Consideration is necessary to the Raising of an Ale.

It being, (as is faid) the Use of the Country to deliver Lands to be fafely kept, the meer Alteration of the Poffession does not in Equity give a Right, but it shall be to the Use of the Donor, unless in two Cases.

- 1. Where the Use is expressed.
- 2. Where there is a valuable Consideration.

1. Where the Use is expressed on the Transmutation of the Possession; for fince there is no Property without a Power of Disposal, the Chancery, without opposing the Rules of Law, cannot fet aside a Disposition, or presume that it is delivered in 'Trust for a Man's felf, against his own express Words; and therefore here no Consideration is necessary to the raising such an Use.

If a Man levies a Fine to the Use 2 Ro. Ab. of A. a Stranger, this is good without 788, 791.

any Confideration.

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So if a Man levies a Fine, and in 2 Ro. 79. Tramp-Consideration of Blood, and the Marriage of his Bastard-Daughter, covenants Sonard. that the Conusee shall be seized to the Use of the Daughter; this is good.

In a Fine fur Grant & Render 2 Co. 76. a. Ibid. the Confideration is expressed to be pro finali concordia; and when a Confideration is expressed, no Consideration can be averred but what Rands with the express Consideration.

The fame Law is on a Recovery or i Co. 176.

Feofiment.

b. Poft

136.

If a Man raises Uses upon a Fine, 2 Ro. Ab. Feoffment, or Recovery, he may referve 1 Co.176. to himself a Power of making Loases; but he cannot do it on a Covenant to stand seized, or on a Bargain and Sale; for upon a Fine, Feoffment, or Recovery, a Use may be raised without a Confideration, and therefore will arise to those Lesses without Consideration: and the former Estates which were raifed without Confideration, may be defeated without it; but in a Bargain and Sale, and Covenant to stand feized, no Uses will rise without Consideration, therefore not to the Leffees; for where the Persons are altogether uncertain, and the Terms unknown, there can be no Confideration; and for which Reason the former Estates, raised upon good

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The two Confiderations upon which a Deed is allowed to be valuable, are Marriage and Money; for Marriages being not only for the Hopes of Posterity, but being likewife induced by the Contracts and Settlements that are made at the Marriage, fuch Contracts are allowed to be valid, fince the Marriage had not been but on the Foot of those Contracts, and therefore no voluntary Deed, tho prior, Gc.

Secondly, Where the Party can prove a Consideration.

Considerations are two-fold, 1. Blood,

2. Money. First, Blood; if a Man parts with 2 Rocks any Lands in Advancement of his Isue, 782, 783. and to provide for the Contingencies and necessary Settlements of his Family, 'tis fit the Chancery should make them fuch good Conveyances tho' they want the Ceremonies of Law; for 'tis the Defign and Intent of the Court of Equity to mitigate the Severities of Law, fo as they may best comply with the Peace of Families; for their Establishment is Part of the Nature and End of Government. ThereRoll. ib. Therefore if a Man, in Consideration of natural Love and Affection, covenants to stand seized to the Use of his Son or Brother, this is a good Use.

ed to the Use of J. S. in Consideration that he is an intimate Friend, or School-Fellow, or that he was bound in a Recognizance; this is not good to raise a Use; for the Obligation that a Man has to his own Family, is supposed by all Governments superior to all Obligations of meer Gratitude; and therefore the Chancery will not presume 'tis the Party's Intent to dispose of

<sup>2</sup> Ro. Ab. Lands out of the Family where any Ceremony is absent that is necessary in Law to the making such a Contract.

of a Bastard, in Consideration of natural Love, is not good; for since that Copulation is unlawful, the Issue ought not to have from the Government the Privilege of a lawful Son.

2 Ro.Ab. Tho' Blood be a good Considera788. tion to raise a Use, yet must the Intent of the Party be declared by Deed, and the Chancery must follow that Intent; for it would be mischievous that any Words of Kindness that express a future Design of Parting with an E-

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If a Man covenants to stand seized to the Use of such Persons as J. S. shall name, this is void, tho' J. S. names one of the Covenantor's Sons. But if a Man covenants to stand seized to the Use of such of his Sons or Cousins as J. S. shall name, this is good; if he makes the Nomination for a general Covenant, that extends farther than a Man's own Kindred, it is void, and falls not within an equitable Consideration; and being in its Creation void, it can never be made good.

Secondly, Money, if an Equivalent be given, tho' the Contract be not executed with all the Formalities of Law, yet in Equity the Use of the Lands

ought to be in the Purchaser.

If a Man, in Consideration of Blood, Co. Lir. makes a Charter of Feoffment, with a 49. a. 2 Ro. Ab. Letter of Attorney to deliver Seisin, 787. and no Seisin be delivered, no Use shall arise; for the Court of Equity must follow the Intent of the Parties; and they have expressed their Intent not to part with the Estate until the Ceremony is performed.

But if a Man, in Consideration of Co. Lir. Money expressed in the Deed, sells his 49. a.

E Land, <sup>2</sup> Ro.Ab. 8 Co. 94. Vid. 2 Ro. Ab. 787. March 50. Land, and gives a Letter of Attorney to deliver Seisin, this passes the Use before Livery; because the Equity to pass the Use arises from the Payment of the Money; and therefore now, since the Statute of 37 H. 8. he may chuse to have it one Way or the other, according as he first wills, either to enroll the Deed, or take Livery, (vid. Bargain and Sale) but if the Consideration be not expressed in the Deed, it must pass at Common Law.

But if Tenant for Life and the Remainder Man in Fee, make a Charter of Feoffment, and a Letter of Attorney to make Livery, and Livery is made accordingly, this is good; and the Remainder shall pass by the Delivery of the Deed; for when a compleat Conveyance appears at Common Law, the Court of Chancery does not

intermeddle therewith.

Selling ex vi termini supposes my Transferring a Right of something for Money, the common Medium of Commerce. But if there be no such Consideration, it may be an Exchange, a Covenant to stand seized, a Grant, &c. but it can be no Sale.

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If a Man bargains and fells Lands 1 Co. for divers good Confiderations and 176. a. Causes, it is void, unless Money be a- 578, 502. verred.

If there be a Consideration of Mo-Moor ney expressed in the Deed, no Averment 578. or Evidence can be admitted against it; for the Assirmative is proved by the Deed, and tis impossible in Law or Equity the Negative should ever be proved.

If the Deed says for a competent Moor Sum of Money, 'tis sufficient, without 578. New averring the Sum; for 'tis a Sale if Rep.

there be any Money.

A Man in Consideration of 70 l. 1 Co.176. bargains and fells to his Daughter and 2Co.76.a. J. S. in Tail, who intermarry, it may be averred, as well in Consideration of Marriage, as also of Seventy Pounds; for a Man may aver any Consideration consistent with that in the Deed.

If a Man in Consideration that J. S. Cro. El. was bound in a Recognizance, and 394 other Bonds for him, and for divers good Causes and Considerations, bargains and sells his Land to him and his Heirs, that is not good; but it \*Ante 29. had been good by Way of Covenant contr. to stand seized, had there been apt Words.

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Cro. El. If I bargain and fell my Land to my Son, no Use arises, unless there be a Consideration of Money, causa

qua supra.

Dy.337.a. If a Man, in Consideration of so much Money, to be paid at a Day to come, bargains and sells, the Use passes presently, and after the Day the Party has an Action for the Money; for 'tis a Sale, be the Money paid presently or hereafter.

Dy. 169.4. An Averment cannot be allowed by the Heir, that the Consideration is false against the Deed and Conveyance of

his Ancestor, causa qua supra.

Co. Rep. If a Man conveys Lands to A. for 199. Lambert the Payment of his Debts, and A. and Bain-pays Debts to the Value of the Land, ton. he is a Purchaser.

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1. How they may be raised with or without Deed.

2. By what Words they may be raifed.

3. How they may be raised by Implieation of Law.

1. How they may be raised with Deed or without it.

If a Lord releases to a Copyholder 2 Ro. Ab. in Fee, to the Use of another, this is 788. a good Use; for since the Seisin and Use of the Estate is in the Lord, he may transfer the Seisin of the legal Estate by passing the Use to another, or not, as he pleases. Quare, if the Law 2 Ro. Ab; is not the same of Releases that enure 788. by Way of Enlargement, and transfmitting of an Estate; but otherwise Co. Lit. of Releases that enure by Way of transfmitting a Right and Extinguishment; for in these Cases the Releasor has not the Use and Possession.

If a Husband covenants with his Wife 2 Ro. Ab. to stand seized to her Use, this is void; 788. for Husband and Wife in all Matters of 112.

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799.

Property, by the Rules of Law, are as one Person; and no Man can covenant with himself.

If a Man makes feveral Declarations 5C0.26 a. of the Uses of a Fine, or Recovery fubfequent, the last Declaration shall stand; for each Declaration is to manifest the Intent of the Fine; now all Acts follow the last Determination of the Mind, and confequently the Fine follows the last Declaration of their Intent.

If a Man declares Uses by Deed, and 5C0.26.4. after declares other Uses by Parol, and the Fine or other Conveyance be purfued according to the Deed, the first Uses shall stand; for a Deed cannot be contradicted but by fomething of equal Validity.

If the Declaration of the Uses and 2 Co. 76. the Fine differ in Persons, in Quantity, 2 Ro.Ab. or Quality of the Land, or any other Circumstances, and there be no other Declaration, this shall stand; for the Law prefumes that this Deed declares the Intent of the Fine, tho' they differ in Circumstances; because it ought to support Men's Contracts, and take them strongest against the Grantors; but there is no Room for a Prefumption, or Guessing at their Mind, where a contrary Intention is expressed. If

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If a Man dectares Uses by Deed, and 5Co.26.b. afterwards declares other Uses by Pa-2Co. 75.6 rol, and these two Declarations differ in those lesser Circumstances of Quantity, Time, or Person, and the Fine is conformable to the last Declaration, that shall stand; for this is not an Averment contrary to the Deed: For then they must be so apparently different that both cannot be confistent. But where the Averment declares the Use of a different Fine, 'tis not contrary to the former Deed: But the Fine mentioned in the Deed, and the Fine levied, being in their Circumstances really different, they cannot be profumed to be the same by the Law, because the Intent of the Fine levied is expressed to be different from the Intent of the Fine mentioned in the Deed.

Now tho' the Expression of a Man's Mind cannot be contradicted, but by Expressions of equal Solemnity, yet where his Mind is only presumed, it may be contradicted by any Expression.

If the Indentures preceding, and those 5 Co. 26. subsequent to the *Fine* differ, the Fine a. b. cannot be directed, Part by the one, and Part by the other; but, (as it is faid) it must be by the latter; for the latter Contract of the same Nature always destroys

the former.

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9Co.10.a. If a Man levies a Fine or suffers a Recovery, he may afterwards declare the Uses, for the Uses are in him in that Case; and therefore 'tis Equity he should dispose of it when, and as he pleases to bar himself and his Heirs.

9 Co. 10. b. v. 29 Car. 2. c.

If a Man levies a Fine, and then declares the Uses by Parol, and afterwards by an Indenture declares other Uses, yet the first shall stand; for the first is a Disposition and Transferrence of his Use; and therefore there can be no other Disposition, for nothing is in him to dispose of; and this is alfo executed now by the Statute, and cannot be divested.

If a Man levies a Fine, and after-9Co.11.a. wards grants a Rent-Charge, and then declares the Uses, Cestuy que Use shall hold it charged, unless he can prove a compleat Agreement before the Grant of the Rent-Charge; for otherwise he must take it as a Substitute of the

other, and as he could grant it.

A Use cannot be raised without a Deed or Feoffment.

If a Man levies a Fine of a Rent, 2 Ro.Ab. 788. he cannot limit the Use of it to a Stranger, without a Deed; for the Use and Possession of that which has its Nature

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Nature and Being by a folemn Agreement by Deed, cannot pass without such Agreement; for otherwise there would be a greater Evidence that the Use continued with the Party, than that it was disposed of.

On a Fine, fur Conusance de Droit tantum, Uses may be raised without a Deed; for affectio tua imponit nomen operi tuo; and therefore where-ever there is an Act that alters the Possession, the Party's own Words may declare the Intent of the Act; and this being according to the Policy of the Common Law, has not been altered by

any Statute.

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On a Fine fur Grant & Render, a different Use cannot be averred by Words only; for in this Fine there is a Use implied, because there is a Confideration, (viz) pro finali concordia, &c. and where-ever a Use is either expressed or implied, there can be no verbal Averment to the contrary; for there is a greater Sign that the Minds of the Parties are altered from the verbal Agreement, than that they continue the same, when they leave no solemn Testimony that there was such a one.

76, 77. 2 And.

pl. 6, 7.

2 Co. 75, But by Deed a Use may be raised upon a Fine sur Grant & Render: 80,81,82. for otherwise the Deed must be wholly Dy. 311. fet aside that the Parties have never cancelled, for that is capable of no other Meaning; but the Fine has a plain and direct Sense, different from the Implication of passing a Use, (viz) to pass the legal Estate; and here it passes that only, because when two Contracts are made, there must be such a Construction of them, if possible, that both may have Effect; especially here, where by the Words of the Deed it appears, a Relation was defigned to each other.

But if the Fine differs from the Deed in Quantity or Quality, or of the Land, or of the Persons, or in any other Circumstances, a verbal Averment may be allowed to reconcile them; and the Uses may well pass by

the Deed causa qua supra.

A Man feized of a Manor in Fee, to which there is an Advowson appendant, bargains and fells them in Fee, rendering Rent to the Bargainor in Fee, provided the Bargainee regrant the Advowson for Life, &c. The Bargainor covenants to levy a Fine of the Manor, Gc. to the Bargainee, and the Bargainee mutually covenants to render back

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back the Rent, by the same Fine, to the Bargainor, the Bargainor and Bargainee join in a Fine to J. S. who grants and renders the Manor, Gc. to the Bargainee in Fee, and the Rent to the Bargainor in Tail, the Remainder in Fee to J. N. tho' the Bargain- 2 Co. from or and Bargainee join in the Fine to 70 to 82. 7. S. whereby the absolute Estate 2 And. feems to be lodged in him, and the to 89. Condition dispensed with, and he ren-Cromders over the Estate to the Bargaince, Cafe. as absolute as he had it; yet is not the Bargainee feized of an absolute Estate by the Grant and Render; for the Use of this Grant and Render will rife, on the Deed declaring the Intent of the Fine, Causa qua supra; and according to that the Bargainee has but a Conditional Estate: And the Deed and Fine differ in Persons, it being levied to 7. S. and in the Manner of limiting the Rent, yet the Use as in the Deed, may be averred to be the Intent of the Fine.

At Common Law any Use might be 2 Inft. raised by Words only.

For Averment of Considerations, see Dy. 229. Consideration, 11 Co.

Secondly,

Secondly, By what Words Uses may be raised.

A Man, in Confideration of B.'s Vid. By what Marriage with his Son A. covenants, Words Uses that after his Death, the Lands shall raised since remain to the said A. and B. and the the Stat. Heirs of A. tho' the Marriage takes Fo. 16. Effect, yet the Uses do not rise by this Covenant; for here the Seisin of the Father is not appropriated to the feveral Uses, but only a Remainder limited after the Father's Death, which cannot be without a particular Estate; nor that without a particular Contract, and no Man can contract with himfelf.

<sup>2</sup> Ro.Ab. The fame Law is if a Man grants the faid Lands to his Son B. after his own Decease, to have and to hold to B. and the Heirs of his Body begotten, the Remainder to C. in Tail.

2 Ro. Ab. If a Man feized in Fee fuffers a Common Recovery, in Trust and Confidence that the Recoveror would execute it to him in Tail, Remainder in Fee to his Son; tho no Consideration be expressed, or any Covenant to compel him to execute it, the Court of Chancery would have formerly forced him

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him to it, and confequently the Statute will now execute it in him.

If a Man seized of Lands in Tail, le-9 Co. fo. vies a Fine, or suffers a Recovery, and Ro. Ab. 7.99. declares no Uses, the Use results to the Recovery, and Ro. Ab. 7.99. Tenant in Tail, and he becomes seized Jenk.cent in Fee by Virtue of the Recovery, because the Recoveror is Tenant in Fee Simple, and then no Uses are declared of that Recovery; and where no Consideration appears from the Recoveror, the Recovery can be to no other Purpose than to dock the Entail.

If the Uses of a Fine or Recovery be declared by a precedent Indenture, all Parties are estopped from averring any other Uses of such Fine or Recovery, because that was the original Intention of fuch Fine or Recovery; but if the Use be declared by an Indenture fubsequent, no Parties are estopped from declaring other Uses, but such as arc Parties to the Deed; because it does not appear to be the original Intention of fuch a Fine; and therefore a Declaration of other Uses may be averred, and no Body is estopped from such an Averment, but those that are Parties to the subsequent Deed. 9 Co. 10. b. 11 a. Cas. in Parl. 144, 145. 4 Mod. 163. 5 Co. 26. a. Cro. Jac. 29.

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But if the Fine varies from the precedent Deed, then any Person, as well the Parties to fuch Deed as Strangers, may aver any other Uses; because the Deed not referring to the fame Time is fubstantive, and the Uses may be averred as if there were no Deed at

But by 29 Car. 2. of Frauds and Perjuries, the refulting Use upon any Fine or Recovery could not be altered without Deed; and then it became a Doubt whether the refulting Uses were not executed, and thereby any subsequent Deed excluded: And therefore for that Purpose the Stat of 4 Ann. c. 16. declares again, that a subsequent Deed may limit the Uses of such Fine and Recovery.

2 Ro. Ab. If a Man gives, grants and confirms 786, 787 his Lands to H. and his Heirs, with a Clause of Warranty, and the Deed be indented and enrolled, this shall raise an Use; because it does not appear to be the Intent of the Parties to pass it by Way of Feoffment, notwithstanding the Warranty; inasmuch as a Ce-Ruy que Use can rebutt by Force of the

Warranty, tho' he cannot vouch.

B.Fal Uf. If a valuable Confideration was gi-Fo.33.S.4 ven, the Fee passed without the Word Vid. Fo. Heirs; for it was Conscience to con-3. 4. vey

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A Use may be entailed; for the Co. Lit. Chancery is bound up to the Mind of 20. a. the Donor by the Intent of the Act of Id. 49. the Donor by the Intent of the Act of Id. 68. Parliament; and this Use may be barred by the Fine or Recovery of the Tenant in Tail, notwithstanding the Party has not the legal Estate, if there be a Consideration for such a Conveyance; for such a Person is out of the Reach of the Statute: But where there is no Consideration there is less Equity in the Case, and therefore less Reason for the Chancery to interpose.

If a Man seized of Lands in Fee makes a Leafe for Life, and then covenants on valuable Confideration, to stand seized to the Use of Tenant in Tail, and then Tenant for Life suffers a Common Recovery voluntarily, this is no Forfeiture; for tho' he has only an Estate for Life by Law, and confequently it would, by the Rules of Common Law, be a Forfeiture, yet fince he in Reversion held it under further Trusts for Tenant for Life, he is out of the Rule; for there is no Equity that a Man should forfeit that to another, which the other is bound to preserve and keep for him, and cannot

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lay hold of at any Time for his own Advantage.

Thirdly, How an Use may be raised by Implication of Law.

2 Ro.Ab. If a Man feized of Lands alone,
789. or with a Stranger, levies a Fine and
limits no Use, it shall be (as has been
faid) to his own Use by Implication of
Law; and the same Law is of a Re-

covery or Feoffment.

If a Man seized of Lands in Tail, levies a Fine or suffers a Recovery, and declares no Uses, the Use results to the Tenant in Tail, and he becomes seized in Fee by Virtue of the Recovery, because the Recoveror is Tenant in Fee; and when no Uses are declared of that Recovery, and no Consideration arises from the Recoveror, no Intent for levying that Fine, &c. it shall be construed only to dock the Entail.

If the Use of a Fine or Recovery be declared by a precedent Indenture, all Parties are estopped from averring any other Uses of such Fine or Recovery; but if the Uses be declared by an Indenture subsequent, no Parties are estopped from averring other Uses but such as are Parties, &c. Vid. all this ante.

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If a Man makes a Lease for Life or 1 Ro.Ab. for Years, this shall be to the Use of the 789. Leffee, or if a Leffee for Life or Years grants over his Term, it is to the Use of the Grantee; for (as is faid) the Use of the Country to declare Lands to be fafely kept, has made the meer Delivery of Possession no Evidence of Right, without a valuable Confideration. But thefe lesser Estates were not used to be delivered to be kept for the future Support and Provision of the Family, and therefore the meer Act of delivering Possession passed a Right, without Consideration; fince there is no Prefumption from the Use of the Country that these Estates were transferred under secret Trusts; especially fince Rents were usually reserved, and they subject to Waste and other Forfeitures.

If Lessee for Life or Years grants over 2 Ro. Ab. his Estate, and limits the Use but of Par-782. cel of the Estate to the Grantee, the Remainder of the Estate shall be to the Use of the Grantee by Implication of Law, causa qua supra.

Seventhly, The several Sorts of Uses.

1. Absolute or Contingent, of which bereafter.

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2. Sole

2. Sole or conjoint Uses, and conjoint Uses may be divided into Estates of Jointenancy and Tenancy in common.

Jointenancy comes under a two-fold Division.

1. Joint Trufts.

2. Joint Estates in Use of Trust.

First, Joint Trusts are again two-fold, with or without an Interest.

With an Interest; as if one devises his Land to his Executors, to be sold, or his Land to be sold by his Executors; Co. Lit. which is all one, and equally transfers to give, grant or dispose of it by Will. Without an Interest; as if one devises that his Executors shall sell the Land; for this does not only transfer it; for to grant that another shall dispose of it by an Act of his, is not, till the Act be accomplished, any Disposition.

Co. Lit. And in the former Case the Interest survives, and the Trust with it.

Dy. 186.a. If an Estate be granted to A. and B. Cro. Car. for their Lives, to the Use of C. for Life, if A. and B. die, the Estate of C. is deter-

mined.

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But if an Estate be granted to the Dy. 186.a. Husband and Wife, habend to the Husband and Wife, to the Use of them and 244.5. the Heirs of their Bodies, this is an Estate in Tail, vested in the Husband and Wife; but this is not a Grant of an Use divided from the Estate, but a Grant of the Estate and the Use to the same Person; so that either the Word, viz. to the Use must be set aside, or that whole Sentence, viz. to the Use of them and the Heirs of their Bodies, because the Parties have appointed no Possession out of which the Use of an Estate Tail may arise.

If there be a Joint Trust, and one re-Co. Lit. fuses, &c. to act according to the Trust, 173. a. the other can act only as to his Interest. al Uses. As if a Man devises Lands to Execu-338. a. s. tors, to be fold, and one of those Jointenants refuses, &c. the other could only sell his Moiety at Common Law; but now in this he may sell the whole, per 21 H. 8. c. 4. tho' the other refuses or dies.

Secondly, Foint Trusts without an Interest.

At Common Law these Joint Trusts Co. Lie. are taken as Authorities, and don't survive, for the Common Law judges of a

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Man's Designs from his Words only; and therefore if a Man devises that 7. 8. and 7. N. shall fell his Land, and one of them dies; since he has authorized and put both of them into his Place, one

But if a Man devises his Land to A.

only can't represent him.

for Life, and that, after the Death of A his Executors, or that his Sons-in-Law shall sell it, and makes four Executors, or has five Sons-in-Law, and one of them dies, the Survivors may sell it; for the Authority remains with the Plural Number of them, by the plain Words of the Devise; for he has made those Persons that come under the Denomination, as to that Ast, his lawful Representatives; and since that Land was to be sold after his Death, 'tis highly probable that as one of the four might die during his Life,

Co. Lit. 112,123. 1 And. 145.

1 And. 149. Lock and Loghing. Co. Lit.

112, 123.

But if in this Case all die but one, he has not an Authority to sell at Common

he could not absolutely intend the Sale

Loghing. Law, causa qua supra.

But the Court of Chancery, that confiders the Nature of the Trust, will impower him to do it, and compel the Heir to join with him, as if it be for the Payment of Debts or Legacies, or to be divided among Nephews or Relations for 'tis equitable that such an honest and

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reasonable Design should be supported, tho it can't Esset by the Rules in construing those Words that necessarily govern at Common Law.

The Executors in the Case may fell Co. Lit. without Deed, for they are but Representatives of the Testator, and the Ven-

dee is in by the Will.

If it be devised that Executors should sell, and one refused, at Common Law, the other could not sell any Part of it, causa qua supra; but now he may sell the whole, because it is within the Equity of the Stat. of H. 8.

The Executors may fell any Part of Co. Lir. it as they find Purchasers; for if they 113. 4. have Authority over the whole they have it over every Part; for a Man can't make void his own Act by doing less than his Authority, when he does an Act that he is authorized to do.

If one Executor refuses to sell or ad-Co. Lit. minister, the other can't sell the Land 113. a. 1 and 127 to him; for since they are authorized to sell, they must of Necessity be excluded from buying, so that no Power was by the Will given to sell to any of them, but to all other Persons exclusive of them.

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Secondly, Foint Estates in a Use or Truft.

I Ro, Ab. If a Man enfeoffs or levies a Fine to 13 Co.55, A. in Fee, to the Use of himself, and B. and their Heirs, they are at Com-1Ro.Abr. mon Law Jointenants of the Use; the Estate in a Use vests according to the Intent of the Parties, which was to place the entire Use in them, and the Possesfion only in A. and fince the Statute executes the Possession in the same Manner as the Use was, they were not Tenants in Common, as one in by the Common Law, and the other by the Statute, but Jointenants by the Words of the Statute.

If a Man makes a Lease for Life, Remainder in Fee to the Right Heirs of 7. S. and 7. N. alive, the Heirs are Tenants in Common, for when F. S. dies, his Heirs have either a fole Property of the Fee, or he has it with others; he can't have it with others, because there is none in Being to take it with him; and if he had a fole Property of the Fee, it can't alter without some Ad of his own; but he can't have a fole Property in the whole Remainder, for that were expressly contrary to the Conveyance; he must therefore have a sole Pro-

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But in Case of a Use Persons may be Co. Lit. Jointenants that don't take at the same 13 Co.56. Time; as if a Man enfeoffs fuch a one Dy. 340. to the Use of himself for Life, and of Co.101. fuch a Wife as he shall afterwards take, they are Jointenants; for here the Hufband has no Property in the Land, neither Jus in re, nor ad rem, but the Feoffee has the whole Property at first to the Husband only, and upon the Contingency of Marriage to them both entirely; and this is the only Rule of Equity to support the Trust in the same Manner the Parties have limited it, and now it is executed by the Statute in the fame Form as it was governed in Equity.

If a Disseism be made to the Use Co. Lit. of two, and one agrees at one Time, 1 Co. 56. and another at another Time, yet they Co. Lit. are Jointenants; for every subsequent 180. b. Consent is equal to a Command pre-223, cedent; and if both had commanded the Disseizm, the first Act had been the Act of both; and therefore from that Act done, they are now esteemed as

Joint Disselfors.

If a Man infeoffs A. to the Use of A. 2Ro. Ab and B. they are Jointenants, tho B. gave no Consideration, because the Use is disposed of expressy to him.

F 4

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Scroope versus Scroope.

Stat. 27,

1 Co.123,

4. I And.

323.

If Father and Son join in the Purchase of Lands, on a valuable Consideration, and the Father afterwards devifes those Lands, the Court of Chancery will not suppose the Concurrence of the Son was only in Trust for the Father; but that he was made Jointenant for his own Advantage; and this was the antient Way of Purchase to avoid Wardships,

#### Eighthly, The Inconveniencies of Mes.

Tho' these Uses had a very equitable Beginning; yet like all new Models and general Schemes of ordering Property, it introduced a great many unforeseen Inconveniencies, and fubverted in many Instances the Institution and Policy of the Common Law.

First, Estates passed by Way of Use, from one to another, by bare Words only, without any folemin Ceremony or permanent Record of the Transaction; H.8. c.10. whereby a third Person that had Right knew not against whom to bring his Action.

Secondly, Ules passing by Will, the Poph. 73. Heirs were difinherited by the inadvertent Words of dying Persons.

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Thirdly, Lords lost their Wardships, bid. Reliefs, Marriages and Escheats; the Trustees letting Cestury que Use continue the Possession; whereby the real Tenants that held the Lands could not be discovered.

of Aliens and Criminals; for they made their Friends Trustees, who kept Posses son, and secretly gave them the Profits so as the Use was undiscovered.

Fifthly, Purchasers were unsecure; for Ibid, I the Alienation of Cestury que Use in Possession was at Common Law a Disseism, and I R. 3. c. 1. gave him Power to alien what he had; yet the Feossess may still enter to revest a Remainder or contingent Use, which were never published by any Record or Livery, whereby the Purchaser could know of them.

Sixthly, The Use was not subject to Ibid. the Payment of Debts, causa qua supra, fol. 7.

Eighthly, Many lost their Rights by Ibid. Perjury, in Averment of secret Uses.

Ninthly, Uses might be allowed in Ibid. Mortmain.

See The Alteration of Property by the Stat. 27 H. 8. cap. 10.

The Design of this Law was utterly Vaugh.
to abolish and destroy that pernicious 50.
Way

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Way of Conveyance; and the Means they took to do it was to make the Possession fall in with the Use in the same Manner as the Use was limited; and where they were all Freeholds, it was thought they would be then fubject to the Rules of Common Law; but the Method has not answered the Legislature's Intent; for it has introduced feveral Sorts of Conveyances quite opposite to the Rules of Common Law: For now wherever a Use is raised, the Statute gives Cestuy que Use the Possession; so that 'tis only necessary to form a Use, and the Possession passes, without any Livery or Record at all, and the Reversions, without the Attornment of particular Tenants; and how the other Purposes of the Statute be evaded will after appear.

Co. Lit. 309.

Here is to be considered;

First, The several Sorts of Uses executed by the former Clause of the Statute, and their several Incidents.

Secondly, The Execution of Jointures by the latter Clauses of the Statute. Thirdly, The Cases out of the Statute.

First, Of the several Kinds of Uses; and they are two-fold; viz.

1. Uses in Esse.

2. Uses in Possibility.

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First, Uses in Esse; and they are raised by Transmutation of Possession, or without it.

First, Of Uses raised by Transmutation of Possession; as upon a Fine, Feostment, or Recovery.

1. In what Manner they are raifed. V. Postea.

2. In what Manner they are executed since the Statute. V. Postea.

3. In what Manner they are pleadable.

First, In what Manner they are raised fince the Statute, &c.

1. By what Rules of Law Uses are go-

A Feoffment is made to the Use of Cro. El. 7. S. and his Heirs Males lawfully be-Dy. 169. gotten, with Remainder over; this does 1 Co. 87. not pass an Estate Tail, but a Fee Simple, since the Statute; for since the Statute has brought the Uses into Possession, they ought to be governed by the Rules of Estates in Possession, as to the Words that are essential to the creating such Uses. Now, if there be no Words essential to the

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the Creating of an Estate; there is no fuch Estate at Common Law, and the Statute has not abrogated the Common Law fo far as to allow an Estate in Being, without Words necessary to create it; and here no body is limited from whence the Heirs of the Tail may proceed. Also no Fee Simple can be created in Uses, without the Word Heirs, since the Statute, for the

fame Reason. 2 Ro. Ab. If a Man makes a Feofiment to the Sed 2 per Use of himself for Years, the Remainder to B. in Tail, Remainder to his own Whether in Right Heirs, and after B. dies without order to make this Issue, living the Feoffor, the Remainder Remainto the Right Heirs, is void, because it der continbeing contingent, there is no Estate of gent, the Freehold to support it; for here is no Limitation ought not to be to Tenant to the Precipe; and the not the Use of having a perpetual Tenant to the R. for Years, Re- Precipe was an Inconvenience the Stamainder to tute expresly designed to redress, and B.in Tail, consequently to this Rule the Statute has

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fubmitted all Uses. der to If a Man makes a Feoffment in Fee the right to the Use of A. for Life, the Remainder Heirs of C. for the Case, as re- to his first Son in Tail, the Remainder to B. in Fee; if A. dies, his Wife being ported in Rolls, and taken bere, privement Ensient, and a Son is afterwards born, he shall take nothing; for does not appear to be a con- if the Remainder does not vest the Determination lingent Remainder, &c.

termination of the particular Estate, is no d the it shall never vest; for, as is said before, the Statute does not change the Namon te in ture and Being of Estates that were fettled at Common Law, and a Recremainder ex vi Termini supposes a parnited Tail ticular Estate, of which it doth remain. mple

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If a Man makes a Feoffment in Fee to the Use of A. his Son for Life, and afterwards to the Use of every Person that shall be his Heirs, for Life only, 'tis not good to the Heir; for it is against the Rules of Common Law, that a perpetual Freehold for Life only fhould descend, because it creates a 1 Co.138. Perpetuity; but it seems in this Case, ". as if the Chancery (fince there is fupposed a good Confideration) would have executed a Fee in A. according to the Intent of the Parties.

2. What Rules of Law are set aside by the Statute.

If a Man makes a Feoffment in Fee, to the Use of A. in Fee; but upon Payment of 100 %. or any other Contingency to the Use of B. in Fee, if the Contingency happens, the Fee shall be executed in B. for though, according to the Rules of Common Law, a Fee can't be limited on a Fee, because a Fee Simple is the largest Estate that

can be limited; and therefore will not bear a Remainder over, by Way of Limitation; and this can't be construed a conditional Estate; because, to avoid Maintenance, the Common Law allows no Stranger to take Advantage of a Condition: But the Necessities of Commerce and Family Settlements induced the Chancery to pass by this Rule, and the Statute has executed the Possession in the same Manner and Form as the Party had the Use. Now since he had but a conditional Fee in the Use before the Statute, he can't have an abfolute and unconditional Estate, since the Statute; for that is to fet up an Estate directly contrary to the express Words of the Statute.

Secondly, In what Manner Uses are executed by the Statute. Ante.

If there be a Tenant in Tail, the Remainder in Fee, and Tenant in Tail makes a Feoffment in Fee, and dies, the Issue shall not be remitted.

Davison's Case.
2 Leon.
222.
1In 348

Where a Feme is Tenant to Life, Remainder to the Heirs of the Husband, and the Husband makes a Feoffment in for their Lives, the Remainder to their own Right Heirs, the Husband dies, the Wife is not remitted.

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The Reason is, because no Man can be remitted contrary to his own Act, and a Statute is interpreted to be the Act of every one, and therefore the Feme Covert and Heir, that are in by the Statute, can't be remitted.

If a Man fuffers a Recovery on the Ro. Ab. Morrow of all Souls, and an Indenture is 799. dated the First of November, wherein and Wenthe expressed, that all Recoveries here-worth. after to be suffered between the Parties, shall be to the Uses contained in this Indenture, the Uses limited in this Indenture shall not be executed on the Recovery fuffered before; for the' Term be as of one Day, and Judgment as of the last Day of the Term, the Recoveries being taken as common Affurances and Uses, according to the Parties Intent, the Word hereafter excludes the Uses from being executed on the Recovery.

If a Man possessed of a Term assigns Pop. 76. it over, or grants it to a Use, this is not executed by the Statute, because the Words of the Statute are, who foever is seized to a Use, the Use shall be executed, Gc. But there is Seisin only of an Estate of Freehold, and the Inconveniencies, that this Statute defigns to

redress, lay in Freeholds only.

But

# Ules and Truffs.

2 Co. 35, Freehold for Years, and the Use shall be executed by the Statute.

To the Execution of a Use four

Things are necessary.

1. There ought to be a Person Seized.

2. Cestuy que Use in Rerum Natura.

3. A Use in Esse in Possession, Rever-

Co. 126.

4. That the Estate of the Feosfees may west in Cestuy que Use, and here only the first and fourth Thing is to be considered; for the second and third Consideration fall under contingent Uses.

First, There ought to be a Person seized, for the Words of the Statute are, if any Person stand or be seized, and if the Feosses be disseised, and then the Statute were made, the Feosses have only a Right of Possession, and that be executed, for the Words of the Statute are, that the Estate, Right and Possession shall be in Cestury are Use.

yet this must be referred to the proceeding Words, and that is in Case where the Ecossess stand seized.

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Thirdly, In what Manner they are pleadable.

If a Man makes a Feoffment in Fee Owen 86. to A. to the Use of B. B. may plead this Feoffment, and shew that 7. S. dif-Green feized him, without laying any actual man. Entry, for the Statute executes the Poffession in him; he may also plead it without shewing any Agreement thereto, because the Freehold is in him, unless he disagree, and then it must be owen 87; fhewn on the other Side, for thereby the Freehold is immediately out of him.

But in Trespass he must shew an actual Entry; for this Action is grounded on the Disturbance of his Possession, or the Violation of his Right by taking the actual Profits, which no Man could hinder him from, or disturb him in, till he shews he was in Possession.

In Pleading the Party shew'd that A. Bro. Fef. was seised to the Use of B. and lay a 337. Disfeizin, without shewing how he C. 8. 10.1 came to be seized, and it was held good; Bro. Feof. Cestuy que Use can't justify the taking 338.1.13. of Beasts Damage-feasant before the Statute, because he had no Estate at Common Law; but he may fince the Statute.

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al Uses,
338. C. s. Land for 20 l. without shewing the Money paid, or a Day alledged for the Payment of it, this is good; for Buying implies Payment of the Money; and if there was none paid, the Plaintiff may reply, he did not buy, Gc.

Secondly, Of Uses that pass without Transmutation of Possession, and they are two-fold according to the two-fold Consideration before-mentioned.

First, Raised by Way of Bargain and Sale, on the Consideration of Money. Secondly, By Way of Covenant to stand seized, on the Consideration of Blood.

First, By Bargain and Sale. Bargain and Sale is a Contract in Consideration of Money, passing an Estate in Lands by Deed indented and inrolled, if a Freehold of Inheritance; if otherwise, by Word only; and here it is to be considered,

1. The several Parts of the Definition.

2. The Effect of this Conveyance.

3. The Exposition of it.

4. The Pleading of Bargains and Sales.

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First, The several Parts of this Definition, and they are five.

1. Who may Bargain and Sell.

2. To Whom, and both these are implyed in its being a Contract.

3. The Consideration, of which is already spoken.

4. What may be Bargained and Sold.

5. In what Manner a Bargain and Sale may be made.

First, Who may Bargain and Sell.

The King and all other Persons that 44 Eliz. Tean't be seized to a Use, can't Bargain B.C.Roll and Sell; for when a Man had sold his kins and Land for Money, without giving Li-Lung. very, the Use passed in Equity, as it is said; and this is executed and becomes a Bargain and Sale by the Statute, and antecedent to any such Execution; here must be a Use well raised, which can't be without a Person capable of being Seized to a Use.

If Tenant in Tail bargains, and fells 10Co. 96. his Land in Fee, this passes an Estate 98. determinable upon the Life of Tenant in 260, 261. Tail; for at Common Law, the Use could not be granted of any greater Estate than the Party had in him. Now Te-

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nant in Tail had an Inheritance in him; but he could dispose of it only during his own Life; and therefore when he fells the Use in Fee, Cestuy que Use has a Kind of Inheritance, yet determining within the Compass of a Life; and the Statute executes it in the same Manner as he has the Use, and consequently he will have some Properties of a Tenant in Fee, and some of a Te-1C.14,15 nant for Life only; but if Tenant for Life bargains and fells in Fee, this paffes only an Estate for Life, for he could

not pass the Use of an Estate for Life to the Bargainee, and the Statute executes the Possession as the Party has the Ule.

Secondly, To whom a Bargain and Sale may be made.

A Man may Bargain and Sell to his 7 Co. 40. 11 Co.24. Son, but yet the Consideration of Mo-Cro. El. ney ought to be expressed, and it ought 394. 1 Vern. to have all the other Circumstances of 137. a Bargain and Sale; but this shall operate as a Covenant to stand Seized, if there be none but the Consideration of natural Love and Affection expressed.

A Man may Bargain and Sell to a 10Co. 24, Corporation; for they may take a Use IRo.Abr. tho' the Money be given by the Gover-788. nors

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nors in the natural Capacity, and a Bargain and Sale in Trust to them is good, tho' the Trust be void when limited to other Persons, causa qua supra.

Thirdly, Of the Consideration, of which sufficient hath been said before.

Fourthly, What may be bargained and fold.

Any Freehold or Inheritance in Pof-2 Co. 54. fession, Reversion, or Remainder up-2 Inst. 671. on an Estate for Years or for Life, or Co. 69. in Tail may be bargained and sold, and it shall be enrolled. A Rent in Esse may be bargained and sold, because this is a Freehold within the Statute.

A Man possessed of a Term can't bar-Pop. 76. gain and sell it so as to be executed by the Statute, causa qua supra. Antea.

But a Man feized of a Freehold may 2Inft.671. bargain and fell it for Years, causa 8Rep.93, qua supra, ibid. And this shall be exe-6, 94, cuted by the Statute of Uses, but it 2Ro.Rep need not be enrolled by the Statute of Enrollment.

Before the Statute, a Rent newly created might be bargained and fold; because when the Money as an Equivalent was given, and Ceremonies or Words of Law were wanting, the Chan-Roll 85.

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cery supplied them; therefore this was good to pass the Estate without any Words of Granting.

But fince the Statute, a Rent newly I Co. 126. 1And,327 created, can't be bargained and fold, because there ought to be a Freehold in fome other Person to be executed in Cestuy que Use; but there can be no Seizin of this Rent in the Bargainor, because no Man can be seized of a Rent in his own Land; and confequently there can be no Estate to be executed in the Bargainee.

Kell. 84.

If a Man fells 20 l. Worth of his 20 H. 78. Land, Parcel of a Manor, this is void, z Co. 36. for that 'tis neither certain in it self nor reducible to a Certainty; for no Man is made a Judge of the Value; otherwise it seems, if he had granted the 20 Acres Parcel of this Manor, for an Acre is a Thing certain, and the Situation may be reduced to a Certainty by his Election.

Kell. 84. Co. Lit. 265.

If a Son bargains and fells the Inheritance of his Father, this is void; because he hath no Right to transfer, and

the same Law is of a Release.

But if the Son makes a Feoffment of the Inheritance of his Father, this pasfes an Estate during the Son's Life; for

Co. Lit. it is a Diffeizin to the Father; and the 265 a. \_ Son after the Father's Death, can't avoid

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ent of s pafe; for an't avoid void it; for no Man can alledge an Injury in any voluntary Act of his own.

But if the Son releases, with Warranty, Ibid. he and his Heirs are for ever hereafter barred of the Rebutter.

If there be two Jointenants, and one of them bargains and fells all his Estate, and before Inrollment the other dies, the Bargainee hath only a Moiety, and the Bargainor is in of a Moiety surviving.

If Husband, seized of Lands, in Right 2 Buls. 5. of his Wife, or Tenant in Tail bar-Mich. 10. Jac. in gains and sells Trees in the Lands, and Billingly dies before Severance, the Bargainee in Horfey's Case. hath nothing; for they are not Chat-Moor 41. tles; and as such, not disposable till Severance.

Fifthly, In what Manner it may be Bar-2Inft.675. gained and Sold; and here is, 1st, To be considered, by what Words it may be Bargained and Sold. 2dly, Of the Inrollment.

First, By what Words it may be Bargain- 2Inst. 675. ed and Sold.

At Common Law, Lands might be Dy. 229. bargained and fold by Words only, for Chilben's it was the Consideration that in Equity Poph. 48, raised the Use; but since the Statute of 49, 50.

G 4 the and Co.

24.

the 32 of H. 8. cap. 16. Lands can't pass without an *Indenture*.

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Dy. 169. 'Tis not necessary to a Use that the Words Bargain and Sell are there, but any Words equivalent are sufficient to make a Covenant to stand seized; for valuable Consideration will raise a Use; so

will the Word Give, Grant, and Confirm.

The Words Bargain and Sell will

Cro. Jac. The Words Bargain and Sell will
Moor 34. not pass a Reversion until Attornment,
1Cro. El. unless it be enrolled; but the Word Alien will; nor will the Words Give and
Grant, without a valuable Consideration
or Attornement, pass a Rent, tho' the

Deed be inrolled.

"Tis already shewn that if a Man makes a Charter of Feoffment upon valuable Consideration, with a Letter of Attorney to deliver Seizin, the Party may chuse either to receive Livery, or to have the Deed inrolled, and so take it by Bargain and Sale.

2Co. 35., Nayward's Cafe.

A Man demises, Bargains and Sells a Manor, Part in Demesne, and Part in Tenants Hands, for 17 Years, the Party may chuse either to take it by Way of Lease at Common Law; and then the Tenants must attorn; or by Way of Bargain and Sale without Attornment; and this agrees with the Policy of the Common Law, to take every Man's Grant, so to pass an Interest, as shall be most

at the re, but ent to for vaIfe; fo infirm.
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makes luable Attory may or to e it by

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Sells art in Party ay of in the ay of ment; of the Man's all be

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most advantageous for the Grantee:
And since in this Case the Words allow
a double Way of taking it, the Grantee: Leonard
shall be at Liberty to judge which is most El. B. R.
beneficial: So at Common Law, if A. Co. Lit.
makes a Lease for Years to B. and afterwards makes a Charter of Feossment to B.
who is in Possession, by the Words Dedi
Concessi with a Letter of Attorney, to deliver Seizin, before Livery he may make
Use of the Deed as a Consirmation, and
afterwards as a Feossment; and a Grant
to Tenant at Will, may enure as a
Consirmation, since no Livery is neces-Dy. 269.
sary to one in Possession.

Where Tenant for Years makes a Charter of Feoffment upon a valuable Confidetion, by the Words Dedi & Concessi, with a Letter of Attorney, to deliver Seizin, which is done accordingly; this is a Forfeiture, for this shall not be taken as a Bargain and Sale, whereby the Term Dy. 262. only is passed, which the Lessee might lawfully pass; but here Livery of Seizin is authorized by him, which ever passes a Freehold, and is a Disseizin to the Reversioner, and consequently a Forsiture of Livery of Livery of Seizin

feiture of his Term.

A. by Indenture, in Consideration of na-

tural Affection, grants to B. a Rent in Ese, habend to B. for Life, the Remain-

der to C. in Tail, the Remainder to the

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Right Heirs of A. after A.'s Death, and there is an Attornment, and it is found C. was Cousin to A. and adjudged that this should rise by Way of Use without

Cafe. Pasch. 1657. Co. Lit. 49.

Attornment; for there can be no Estate Jackson's at Common Law by Attornment after the Death of the Grantor; for to every Contract a Grantor and Grantee is necesfary; and if any of these are wanting when the Contract begins to take Effect, 'tis wholly void and infignificant.

Secondly, Of the Enrollment, it has been already shewn, that the Statute of the 27 H.8. cap. 10. by executing all Ules raised, introduced a secret Way of Conveyance, contrary to the Policy of the Common Law; and to remedy this, the Enrollment of the Deeds of Bargain and Sale was invented; which by cap. 16. was to be within fix Months after the Date. And here three Things are to be confidered.

- 1. The Relation between the Enrollment and the Deed.
- 2. What Estates are to be enrolled.
- 3. When they are to be enrolled.

First, The Relation between the Enrollment and the Deed.

At Common Law, the Use passed from the Delivery or Date of the Deed; by the h, and found d that ithout Estate after every necelanting te Etant. it has ute of 11 Uses f Conof the is, the in and 6. was Date. e con-Enrolllled. e End from

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the Stat. of the 27 of H.S. c. 10. the Possession passed, as the Party had the Use, which then was from the Delivery of the Deed; but 'twas thought convenient to add further Circumstances to these Contracts; and therefore cap. 16. provided, That the Possession should not stand or alter from one to another; or any Use be made, by Reason of any Bargain and Sale, unless it be by Deed indented and enrolled within fix Months. So that the Bargain and Sale is void and ineffectual to any Purposes; unless it hath the Qualifications required by the Statute: Dy. 218. But if it hath these Qualifications, it Hob. 136. hath the same Effect it had before at 4 Co. 71. Common Law; (to wit,) to raise the fol. 57. Uses from the Delivery; for the Words of the Statute are only to add some Things, and not to abolish or set aside the Force it had formerly; and if the Use passes from the Date of the Deed, the Possession must pass in the same Manner by the 27 H.S. c. 10. for this Statute of Enrollment doth not destroy the Operation of the Statute of Uses, if the Conveyance be made effectual by all Circumstances required by this Statute; and then the Statute of Uses must have its Effect, according to its own Words, and pass the Possession immediately.

From

From hence it follows, that the Bar. gainee hath not the Freehold till Enrollment; for till then, there is no Contract effectual to alter the Property.

2 Bulft. 5 If a Man bargains and fells his Manor, M. 10. to which there is an Advowson appen-Tac. in Billingby dant, the Bargainee can make no Title and Hor-

sey's Case, to present before Enrollment.

A Release to the Bargainor before Mackrels Case, 10 Enrollment, is good; and it enures to El. 2 Co. the Bargainee, because the Releasor 56. 4. can't claim the Right that he hath paffed out of himself by his own Release.

If there be two Jointenants, and one Bro. Tit. Faits Enf. 322. a. S. of them makes a Bargain and Sale of his 9. 6 E. 6. own Estate in Fee, and then the other Cro. Jac. dies, the other Moiety shall furvive to the Bargainor; for fince the Freehold Co. Lit. 186. is in the Bargainor, the Fointure con-I Bulft.

tinues. 3, 1. If a Man bargains and fells his Land, I Rep. and then fuffers a Recovery, levies a Hind's Cafe. Fine, or makes a Feoffment to the Bar-Moor 681, 337 gainee, and then the Deed is Enrolled;

2 And. 3, the Land passes by the Recovery, Fine 4Leon. 4. or Feoffment; for fince the Freehold Poph 49. and Use is in the Bargainer till En-Hob. 222. rollment, it must pass by the Recovery, &c. And when it has passed by the Recovery, the Use can't rise, nor the Possession be executed from the Date of the Deed.

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But if the Land had been in any City, Yelv.123. Burrough or Town Corporate, that have 2 Inst. 675. the Privilege of Enrollment, it had been otherwise; for they are excepted out of the Statute of Enrollment; and so the Possession is executed from the Date of the Deed.

If a Man Bargains and Sells Land to A. and then grants a Rent-Charge to B. and then levies a Fine to the King, and then 'tis to be enrolled, he shall hold the Land discharged; for the Land passes by the Grant; for Grants to the King must be by Matter of Record, and not Deeds recorded, as are the Sales of common Persons; and there can be no Averment or Proof against a Record; and by the Record, it appears, if any Interest were transferred, it passed from the Date which was before the Fine: Also when such Deed is acknowledged in Court, 'tis good without Enrollment; for 'tis not the Enrollment, but the Acknowledgment of it, in a Court of Justice which gives it the Sanction of a Record.

From hence it likewise follows, that after Invollment, the Freehold is in the Bargainee from the Date of the Deed.

If the Bargainor or Bargainee dies 2 Infl. 674. before Enrollment, it may be enrolled; Hob. 136. for 229, vide Godbolt, Cafe 337.

for here are Parties to give and take the Interest when it begins to vest; for it vests from the Date of the Deed; otherwise it is in Case of Attornment.

If a Man Bargains and Sells his Lands, the Bargainee may be Tenant to the Precipe before Enrollment.

He may, by the better Opinion, receive a Release before Enrollment.

1 And.

The Bargainee may maintain an Af-

fize before Enrollment.

If there be two Jointenants, and one of them Bargains and Sells to another Statum Juum in Fee, and dies before Enrollment, and after 'tis enrolled, his Moiety passes to the Bargainee, and shall not survive.

Hale and If a Man Bargains and Sells a ReDavie
Laches version, and the Rent is incurred; and
151. afterwards the Deed is enrolled, the Bar1Sid. 310. gainee shall have the Rent unpaid; but
Owen 15. if the Rent be once paid to the BarCase 209 gainer, that will be a good Payment

by the Tenant of the Land; and the Bargainor is not accountable; because the Contract had not any Effect to pass the Estate from the Bargainor before Enrollment; and the Relation of the Law can't make void an Act that was lawful; for it can't be set aside, but by an express and positive Law.

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If a Man makes a Lease for Life, Owen 69. with a Clause of Re-entry, reserving a Rent; and then Bargains and Sells the Reversion, and the Bargainee demands the Rent, and the Lessee resuses, and then the Deed is enrolled, the Bargainee can't Enter for the Forseiture; for till Enrollment, he is not Grantee of the Reversion within the Statute, capable of the Duty; and consequently 3 H. 8. at the Day, could make no legal De-c. 34. mand; which was precedently necessary to his Entry.

If Tenant for Life be impleaded after a Bargain and Sale of the Reversion, and then the Deed is enrolled, the Bargainee shall be received; though no Man shall be received by the Stat. Western. Owen 70.

2. that purchases the Reversion, pen-

dente lite.

If a Man seized in Fee, is bound in Owen 70, a Recognizance, and then Bargains 1, 2. and Sells all his Lands, and then the Re-2Inft.674. cognizance is forfeited; and then a scir. fac. is issued against the Lands in the Hands of the Bargainor, and then the Deed is enrolled; this Scir. fac. is not maintainable.

If a Man Bargains and Sells his Land to A. and before Enrollment Bargains and Sells it by Deed to B. and the last Deed is first enrolled, the last

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Deed is of no Effect; for after Enrollment within the Time Deeds have
their Effect according to Common
Law; and consequently the first Deed
Moor 42 hath the whole Effect, and the other
passes nothing; the same Law is of a
Fine levied to B.

Cro. Jac. If Land be Bargained and Sold to A. 52, 3. and before Enrollment A. the Bargainee Hob. 13, 6. Bagains and Sells it to B. and A.'s Deed Noy 10, is first enrolled, the Sale is good to B.

But Quere if B.'s Deed be first enrolled; because when the Contract first becomes effectual to pass an Interest, A. had no Interest transferred to him by any effectual Contract, which he could pass over to B. and if a Contract hath all the Circumstances required by the Law to make it of Force, and yet passes no Interest, it can never pass an Interest after, according to the Rule, quod ab Initio non valet ex tractu temporis non convalescit.

2 And.

If Lands are Bargained and Sold, and a Stranger enters, and then the Deed is enrolled, and the Bargainee dies, his Wife shall be Endowed.

But if Lands are Bargained and Sold, and the Bargainee dies before Enrollment, his Wife shall not be endowed; for the Right of Dower is according to the Rules of Common Law, consummate

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by the Death of the Husband; and at the Death of the Husband, the Bargain and Sale had no Effect to vest the Lands in him; and tho' the Freehold, after Enrollment has a Retrospect to the Date of the Deed; yet there can't thereby arise to the Wife a new Title of Dower, contrary to the Rule of Common Law, without an express Provision by the Statute.

But if a Man Bargains and Sells Cro. Car. Lands by Indenture, and then takes a 569. Wife, and dies, and after the Deed is enrolled, the Wife shall not be en-

dowed.

If there be a Custom in Copyhold Cro. Car. Lands, that the Wife of the Tenant 568, 569. Shall be endowed of the Lands of which he died possessed, and the Tenant becomes a Bankrupt, and the Commissioners of Bankrupts Bargain and Sell Parker the Lands, and the Tenant dies, the Bargainee is admitted; his Wife shall not be endowed; for after Enrollment or Admittance, the Bargainee is in from the Date of the Deed; and consequently is in paramount to the Wise's Title of Dower, and all other Incumbrances whatsoever made in the mean Time.

H

2. What

### 2. What Estates ought to be enrolled.

An Estate of Freehold or Inheritance 2Inft.271. must be enrolled; but not Terms for Years; for they are not within the Words of the Statute.

If a Man Bargains and Sells Lands 7 Co. 40. to his Son, in Consideration of Money,

Bedel's the Deed must be Enrolled. Cafe.

Dick's Cafe. Stile 188. Co. fup. Lit. 49.

But if the Father in Confideration of Mic16.49 Natural Love and Affection, and also Wats and in Consideration of Money, grants Lands to his Son, this need not be enrolled; for Covenants to stand seized are not within the Words of the Statute; and where the Consideration of Blood is expressed, it may enure as a Covenant to stand seized; but 'tis only a Sale when the Consideration of Money is alone expressed; for that excludes all other tacit Considerations: And Cities, Burroughs, &c. that have the Privilege of Enrollments, are not within the Act; for tho' the Intent of the Makers of that Statute might be not to have excepted them from Enrollments in the Courts of Westminster; yet the Statute is fo worded, that they are difcharged from any Enrollment at all The Words are, "Provided always, that this Act, nor any Thing therein contained

enrolled.

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" tained extend not to any Manor, " Lands, &c.

3. When it may be enrolled.

It must be enrolled within six Months from the Date which shall be accounted according to the Computation of twenty-eight Days per Month; for a 2Inst.674. Month in its proper and original Signi-Gassen-sication is the Space Time measured by dus 56. the compleat Course of the Moon; and the Year is measured by the Compliment of the Sun's Course.

From the Date, and from the Day of Co. fup. the Date in this Case, is taken all one, Dalisons. as it is in all other Cases of Computa-Hob. 140. tion; and therefore the Enrollment may Moor 40, be on the Day of the Date, or on the 2Inft. 674. last Day of the fixth Month after the 2Ro. 520. Day of the Date; for tho' when an Hob. 139. Interest passes from the Day of the 6 Co.1, 6. Date, the Day itself is excluded; yet when a Time is stinted, in which an Act ought to be done, it is in Order to hasten the doing of that Act; and therefore the doing it on the Day from whence the Period is first reckoned, within the Time appointed, and the last Day of the sixth Month, is within the Words of the Time given.

## 100 Ales and Trusts.

Hob. 140. If the Deed has no Date, the fix Moor 42. Months are to be reckoned from the Delivery, but not otherwise.

Secondly, The Effect of a Bargain and Sale.

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#### It works no Discontinuance.

Sand. 260. A Tenant in Tail, bargains and sells 2Inst. 644. his Lands in Fee, only an Estate of Freehold passes; because it is determinable within the Compass of a Life, and therefore he can't devise it; for the Statute of 32 H. 1. 35 H. 8. 3. give only a Power to devise a Fee Simple, which is the express Exposition of the Word Inheritance.

1 Co. 98.b. But yet the Bargainee hath several Sand. Properties of a Tenant in Fee, he is Dispunishable of Waste, doth not forfeit by Alienation; and the Reason is, because, as he gave a Consideration for

the Use of the Fee, 'tis fit he should have all the Properties of the Fee that were not prejudicial to the Right of

Ibid. Sand the Issue in Tail, and were not within the Power of the Father to dispose of.

O. If the Wife be dowable.

But if Tenant in Tail Bargains and 261. Sells Lands in Fee, and afterwards Le10 Co.96. vies a Fine, the Bargainee is then to Uses 337. b. S. 7, 21. H. 8. 21. feized

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ds Les then feized feised of a Fee-simple determinable on the Estate Tail, inasmuch as the Issue in Tail is barred by the Fine, for that bars all Parties and Privies, tho' not the Remainder Man; and when the Right of the Tenant is extinguished the Issue hath no Claim against the Tenant of his Ancestor; but if the Bargainee had levied a Fine, the Issue, by the Statute of Fines has sive Years from Cro. Eliz. the Descent; for the Ancestor could 896. not claim in his Life-time.

If the Bargainee in this Case devises the Lands, and dies, and afterwards
the Bargainer levies a Fine, the Heir
of the Bargainee shall have it, and not 1 Sand.
the Devisee, for the Devise is Consummate at the Time of the Death of
the Devisor, and if then it be void, it
cannot after be made good.

If Tenant in Tail Bargains and Sells 1 Sand. his Land in Fee, and then levies a Fine 261. in Fee to a Stranger, the Bargainee hath a Fee-simple determinable upon the E-state Tail; for Tenant in Tail hath to all Purposes departed with his whole Estate, tho' the Right of the Issue is sav'd, and consequently he can pass nothing to the Conusee of the Fine.

A Bargain and Sale works no Forfeiture:

But if a Man levies a Fine of an Advowson, or any Thing lying in H 3 Grant;

Grant; tho' this divests not the Rever?

sion, yet it works a Forfeiture.

For a Forfeiture Is a Punishment, for doing fomething contrary to the Nature and Being of the Estate he hath, and contrary to the Trust and Fidelity due to the Person from whom it was derived, or his Substitutes; therefore if the Tenant for Life, by Feoffment or Granting it by Record, or any other Act, took upon him the Right to the Fee, it was a Forfeiture; but otherwise, it was, if he fold the Use in Fee; for Uses are only the Creatures of Equity, and not taken Notice of at Common Law; and the Chancery in Favour of a Purchaser

al Uses

Bro. Feoff. for a valuable Confideration, fince there 338.6.922. is no Prejudice to the Reversioner, will allow this, as a Man grants the Use of an Estate for Life, and the Statute executes the Possession, as the Party has the Ule, which is only during the Life of the Bargainor, and works no Forfeiture.

4 Co. 125. Co. Lite

239. 4.

A Bargainee cannot Vouch by Force of a Warranty, annex'd to the Estate of the Lands; for he that is in by the Statute, is in the Post; for he is not in the Possession by the meer Contract of the Party, but by the general Law of the Land; and therefore by the Writs of Entry, cannot be faid to be in the per, that is by

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by fuch a one; and he that is in the Post can't vouch ; for a Warranty is a Covenant, annexed to the Freehold, whereby the Party agrees to take it up when controverted, and to defend it; it can therefore only extend to those that claim the Freehold from him, and not to those that come to it any other Way, but he may Rebut; for tho' he hath not covenanted to defend the Lands to him, yet he can't claim them, because when any Man covenants to defend the Lands, be it to whom it will, it appears thereby the Warrantor can have no Right to 2Ro. Ab. claim them, unless a new Title appears 787. after the Warranty.

The Use and Possession passes to the 2 Inst. 67 same Intent; and therefore a Man may Bargain and Sell, reserving a Rent; for the no Rent be reserved out of an Use, for a Rent had its Nature and Being at Common Law, and accordingly reservable; yet now the Use and Possession carry a Relation to the same Moment that the Rent is well reserved, and there is an

Estate out of which it may issue.

If a Man sells a Reversion upon a In Mal-Lease for Life or Years, the Bargainee lor's Case, shan't take Advantage upon a Demand 5 Co.114. of the Rent, without Notice of the Cro. Jac. Bargain and Sale; for it was never the 146. Intent of the Statute of Enrollment,

H 4 that

that the Farmer should be forced every fix Months to fearch for the Eurollments in Defence of his own Tenure.

Co. Lit. 273. a.

At Common Law, no Man could release to Tenant for Years, unless in Posfession; for all Possessions were transferred by Livery folemnly, and there can be no Livery where the Party is in Poffession before; therefore there the Interest must pass by Way of Release; but where he is not in Possession, he is within the Rule, and therefore must take by Livery.

Co. Lit. 273. a. Vaugh. 44,5,6,7, 8, 9, 51.

If a Man makes a Lease for Life or Years, and after grants the Reversion for Life or Years, and the Tenant attorns, the Lessor may release to the Grantee; for there is no Need of a new Grant and new Attornment, where the Party is already in Attornment of the Reversion.

Cro. Jac.

If a Man Bargains and Sells Lands Lutwych for Years, he may release to the Bar-. Milton. gainee, without Entry; or if he bargains and fells the Reversion for a Year, he may release to the Bargainee, without Attornment, because the Possession is vested in the Lessee by the Statute; and consequently is capable of a Release, causa qua supra.

If a Man, designing to convey Lands 2 Ro. Ab. to B. demises, grants, bargains and sells 5 Car. B. R. Grotton Leffee of Sir John Dorrel. them

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them to A. for Years, and afterwards Releases them to A, for the Use of B. this Release is good before there is any Agreement of A. to take the Release by Way of Bargain and Sale; and if A. afterwards chuses to take this as a Release at Common Law, whereby a Possession would be necessary to the Operation of a Release; yet shall not this destroy the Estate of B. because A. being expressed to be made use of but as an Instrument to convey it to B. such an Exposition must be made, as will make him capable of doing it; and not fuch as would make the Conveyance of no Signification.

Thirdly, The Exposition of a Bargain 2 H.7.9.a. and Sale.

Every Bargain and Sale shall be expounded equally and indifferently between both Parties, because they had their Original in Equity; but otherwise it is of Gifts and Grants at Common Law, which are taken strongest against the Grantors.

If before the Statute, a Man had Kell. 85. Bargained and Sold to A. and afterwards had executed an Estate by Livery to B. the first Vendee had been without Remedy, causa gua supra.

A Bar-

Co. Lit.

251. b.

Co. Lit.

225. b.

A Bargain and Sale of Land to 7. s. Cro. Jac. 659, 660 in Fee, with a Proviso, that if the Bargainor pay so much at such a Time, the Bargain and Sale shall be void; and the Bargainee covenants not to inter-meddle with the Profits; but for the Default of Payment, the Bargainor is Dowfly v. Tenant at Will to the Bargainee; and if he makes a Leafe for Years, he is no Blackman, Diffeizor to the Bargainee, because no Bridgman 121. wrongful Intention; and when the Leafe

expires, he is Tenant at Will.

Fourthly, The Manner of Pleading Bargains and Sales.

A Bargain and Sale is a Deed Enrolled, and as fuch must be pleaded; the Deed it felf, whereby the Use it 5Co. 53.4. self originally passes, is a Matter in Pais, and must be shewn to the Court, and not the Tenor of the Deed which is on the Roll of Record; for the Enrollment is the Transaction of the King, or his Courts of Justice; and therefore they have the Esteem of undoubted Fruits; and consequently Grants to the King, or Instruments to any Subjects made in open Court, are Records, and uncontroulable; but the Deeds of Subjects privately made, not in open Court, when the Party claims from the

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Date or Execution of these Contracts, have not the Sanction of Records, tho the Deeds be after publickly Acknowledged and Enrolled; for the private Contract may be falsely and fraudulently dated, or ill executed; and therefore, tis necessary they themselves should be shewn, since the Party from their Commencement derives his Title.

But the Tenor of an Enrollment is a bid, Record which can't be produced; because, tho' 'tis certainly an authentick Copy, yet it may be the true Copy of a false Deed.

But the Act of Enrollment is a Trans- 4Co. 71, action of the Court, and therefore can't be denied; but as all other Records may, by Pleading Nul tiel Record, and the 2Ro.Rep only Trial is, by shewing it; but the Time of Enrollment, when it doth not appear on the Rolls it felf, as antiently it did not, was to be tried by a Jury; but when the Time doth appear on the Roll it self, as it hath done since the Office of Enrollments, it shall be tried by nothing but it self.

Hence it follows, that if an In-2Inft.613.

fant Bargains and Sells his Lands
by Deed, indented and enrolled, yet
he may plead Nonage; for notwithflanding the Statute, the Bargainee
claims by the Deed as at Common Law,

which

which was, and therefore is still defeat fable by Nonage.

2Inft.673. Bro. Faits Enroll. 328.

But if an Infant contracts in open Court; as if he acknowledges a Statute, Gc. he can't plead Nonage against it; 8.5,11,14 for if the Court have allowed him to have a contracting Power, there can be

no Averment to the contrary.

Bro. ibid. 17.

If an Infant makes an Obligation, and afterwards acknowledges and enrolls it in open Court, he can't plead Nonage; for the Recognition of any Personal Contract, amounts to the making of one, for the Design of all Personal Contracts is but to acknowledge an Obligation, which, when done in Court, is not to be controverted; but in real Contracts, the Design of the Statute is, that the Instrument it self, with apt and fignificant Words should pass the Interest, and not the Recognizance, which is only a folemn Act appointed for further Notoriety; and therefore the Party must claim from the Words that transferred the Estate, which are only in the Deed.

But if an Infant acknowledges the StaaInft. 676. tute or Obligation in Court, he may avoid it by an Audita Querela, for he is inspected in Court, and the former Act may be annulled by an Act of equal Authority.

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gain a the D shew out l verfar Search Secur By the Common Law, a Deed acknowledged by the Husband and Wife, binds only the Husband; for the Wife can't be examined by any Court, without a Writ, and there is no Writ allowed in this Case, for the better Security of Wives, who are, by our Law, entirely subjected to the Will of the Husband; so that the Court is not impower'd to take such an Obligation, but it is an Act extrajudicial.

But the Custom of London, that al- Inst. 673. lows them to trade separately, binds s. 17.

them also by such Obligation.

If a Man acknowledges and enrolls Bro. ibid. a Deed, he can't afterwards plead Moor 42.

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If a Man makes a Lease for Years Owen the 10th of May, and afterwards Bar-Thomas gains and Sells his Land, and antedates Howard's the Deed, the Acknowledgment and En-Case. rollment the 10th of April, the Lessee is without Remedy; because there is an Averment against the Record.

The Party that claims by any Bar-Yelv.213. gain and Sale must shew in what Court 1Co. 7. a. the Deed is enrolled; because he must shew all Things in certain that make out his Title, and otherwise his Adversaries would be put to an infinite Search before he could traverse with Security.

Secondly,

Secondly, Of Covenants to Stand Seized upon Consideration of Blood; of which see before.

Billingham and Morley, Mich. 9. *W*.

The Original of it was in this Manner before 27 H. 8. When any Man covenanted to stand feized to the Use of another, the Remedy was two-fold.

First, By Action at Common Law upon the Covenant, and thereby Da-

mages only were recovered.

Bro. Feoff. to Ufes, 338. S. 16.

Secondly, In Chancery; and here the Remedy arose thus; when any Man covenants to do a Thing, the Party is first bound in Conscience to perform the Thing it felf; and if that can't be, then to render Damages for not doing of it; therefore the Chancery that examines the Conscience of Men's Actions requires a specifick Performance of the Thingit felf, where it can be had: But the Common Law could not carry this Covenant fo far without offering Violence to its Com. 308. own Rules; for the Common Law 18quires Livery, and to allow an Action; for a specifick Performance makes the

Agreement binding without it; but by

the 27 H. 8 these Uses are executed, and

therefore no Action lies; for there can

be no Complaint for not transferring

the Thing, when the Statute transfers it

to the Party himself.

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deration of Marriage, need not be indented or enrolled, for they are not
within the Statute of the 16th; for Marriage makes it publick, and it was not
thought fit to publish it any otherwise.

And here 'tis to be considered,

1. Who must Covenant to stand Seized, and to whom.

Seconly, What Confideration is neceffary to a Covenant to stand seized. Thirdly, By what Words a Man may Covenant to stand Seized. Fourthly, The Effect of a Covenant to stand seized.

First, Who may Covenant to stand Seized, and to whom.

Tenant in Tail Covenants to stand Cro. El. Seized to the Use of himself for Life, Bedding-Remainder to his eldest Son in Tail; field's since he had only the Power of dispo-Blything of an Estate for Life, by the Staman and tute de Donis, which he hath not passified out of himself, it is still in him as a constitute de Donis, and the Remainder is void in its Creation, and therefore there can be no Execution of it, for the Execution must be immediate by the Statute of Uses; and therefore a Fine afterwards levied can't help it.

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But it seems in this Case, that before the Statute, the Chancery would oblige to a Specifick Performance by Fine against the Party himself, but not against his Issue; Quare.

Secondly, What Confideration is necesfary to a Covenant to stand Seized, and how far it extends.

Tho' a Man can't Bargain and Sell but upon Consideration of Money, yet he may Covenant to stand Seized upon other Considerations besides that of

Blood.

If a Man, in Consideration that J.S. was bound in a Recognizance for him, Covenants to stand Seized to his Use, this is good; for the Chancery will oblige a Specifick Recompence upon any Agreement, where a Consideration was performed on one Side; and where the Chancery would raise an Use the Statute executes it.

r Leon. 165. Pagett's Case. If a Man, seized of certain Lands, in Consideration that J. S. will pay his Debts, and certain Sums of Money that he shall appoint, out of the Profits of the Land, Covenants to stand Seized to the Use of J. S. for twenty-four Years, this shall not raise a Use; for since the Debts are to be paid out of the Profits of

Cro. El.

394.

of the Land; this is no Consideration to part with them, or vest an Interest in 7. S. for the Confideration arises from his own Property, and not from any Equivalent; but otherwise it had been, if the Debts were to be paid out of the proper Lands of 7. S. causa qua supra.

If a Man Covenants to stand Seized to the Use of three Perfons, for the performing feveral Trusts to himself, his Wife and Children, and one of these is his Brother, to him alone there is a Confideration; and therefore he alone Cro. Car. is seized of the Interest under the Trust 529. Smith and aforefaid.

There is a Difference between a Co- 1 Leon. venant to stand Seized and a Feoffment; 195. 10. for if a Man Covenants to stand Seized Plowdens to the Use of A. a Stranger for Years, Com.307. Go. the Remainder to B. his Son in cont. Tail, this is void as to A. for Want of a Consideration, and the Use vests immediately in B. and a void Use is as if no Use be limited; and if no Use be limited, B. must take immediately, and not by Way of Remainder, or else he can't take at all; for a Remainder ex vi Termini supposes a particular Estate, and B. must not be excluded, because Uses being Creatures of Equity, the Parties Intent must be made good as far as posfible, where there is a just and good Ground

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### Uses and Trufts. 114

Ground for any Part of the Conveyance.

I Leon. 197. wood.

But if a Man makes a Feofiment in per Man- Fee to the Use of A. and a Stranger, or Bastard for Life, the Remainder to his Son in Tail, this is good to A. for upon a Feoffment there needs no Consideration to raise the Use, as is said.

If a Man, feized of three Acres. 5 Co.8. b. makes a Lease of one to A. for Life, and of another to B. for Life, and of another to C. in Tail, and then reciting the feveral Estates, Covenants after all the Estates finished, to stand seized to the Use of his Brother in Fee; if A.dies, the Brother shall have the Reversion of that Acre immediately, and not expect till the other Estates are determined; for it must be construed secundum subjectam materiam; and the Covenantor hath three distinct Reversions in him.

> Thirdly, By what Words a Man may covenant to stand seized.

Vent. 138 Mod.Rep from 175 to 179, 2Ro. Ab. 787.

If a Man, in Consideration of Natu-139, 140. ral Love, and for Augmentation of his Daughter's Portion, Gives, Grants, Bargains and Sells, Aliens, Enfeoffs and Confirms certain Lands to J. S. his Daughter, with a special Warranty, and the Deed is enrolled, this enures by Way

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of Covenant to stand Seized, in Respect of the Consideration.

But if the Consideration be not ex- Co. sup. pressed in the Deed, it seems no Use a- 111. 49, 8Co. Fox's Cafe,

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If a Man, in Consideration of Mar-March riage of his Son's Daughter, covenants Moor122. that his Land shall Descend, Come and Pl. 267. Remain to him, or her, this is only a Cro. Eliz. Covenant Executory, upon which an Action lies, and the Force of the Covenant is not to alter the Defcent; but 'tis no Covenant to stand Seized, whereby he may be intitled in Chancery to a Specifick Performance.

If a Man seized of a Reversion Ex- 2 Vent. pectant upon an Estate for Life, Gives, mon and Grants, and Confirms the fame to his Jones Son in Fee, in Consideration of Natu-Sid. 25. ral Love and Affection, expressed in the v. Dix. Deed to the Use of himself for Life, the Remainder to his Son in Tail, the Remainder to a Daughter, without Attornment or Enrollment, this Conveyance is void, and can't enure by Way of Covenant to stand Seized; for if it enures by Way of Covenant to stand Seized, the legal Estate out of which the Uses rise remain in the Covenantor: But the Intent of the Conveyance is to raise the Uses by Way of Transmutation of Possession, and to transfer the Freehold, out of

### Mes and Trusts. 116

of which the Uses are to rise to the Son; but this Conveyance will not pass that Freehold for Want of Attornment, and so the Uses can never arise by this Deed.

Fourthly, The Effect of a Covenant to stand Seized.

If a Man Covenants to stand Seized 2 Ro. Ab. 790. N. 5. of the Manor of D. to the Use of J. S. this is void, though he afterwards purchases the Manor in Fee.

Noy F.19. Cro. El. 40I.

If a Man Covenants to stand Seized of the Land that he shall hereafter purchase to the Use of his Son, and after purchases Land to the Use of himself and his Heirs, the Fee is in the Father.

For if a Man binds any Lands, you

must suppose him to have a Power to oblige them; for no Man can do that which he hath no Power to do; but he that hath no Interest, hath no Power to Ibid. per oblige them; and therefore fuch a Covenant in Equity, before the Statute, could not oblige him to a Specifick Performance, for that were in Equity, to bind the Land, which is abfurd; and fince the Covenant is void in Equity, there can be no Execution by the Statute; for the Rules of Law are equally strict in avoiding this Repugnancy; tor

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for in Law, every Disposal supposes a precedent Property; and by Consequence, every Covenant to stand Seized presupposes a precedent Seizin.

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By the same Rule tis said, that if Cro. El. the Mortgagor, in Consideration of so much Money paid by J. S. Covenants, that after Redemption, he will stand seized to the Use of J. S. and his Heirs, this is a void Covenant; but if a Feoff-Noy 19. ment be made to A. to enfeoff B. to the Use of C. and A. enfeoffs B. without the Limitation of any Use; yet it shall be to the Use of C.

So if a Man covenants to purchase Land by Michaelmas next, and before Easter following, to levy a Fine to such Cro. El. Uses, and accordingly purchases Land, 402. and levies a Fine, it shall be averred to Noy 19. be to the Uses limited in the Covenant.

For a Man may declare the Intent of a future Act, which he had no Power to do at the Time of the Declaration; for to declare the Intent of a future Act, doth not suppose an immediate Power of doing it; but the doing any Act it self, which the Law allows to be good and effectual, presupposes the Power of doing.

Another Reason why the Use decla-Cro. El. red upon the Covenant in the first Case Noy 19, of Land after purchased is bad, is this;

I 3 be

Donor or Feoffor; for he must limit the Use, that at the Time of Limitation had the Disposal: Now in this Case the Donor limits the Fee to the Purchafer, which controuls the Intent of the Covenant.

Secondly, Of Uses in Possibility.

First, Of Executory Fees. Secondly, Contingent Remainders,

First, Of Executory Fees. How Executory Fees begun, and how the Rule of Law, that no Fee can be limited upon a Fee, is evaded, is already shewn; and when an Executory Fee is well raised, that it can't be destroyed but upon Alienation, upon good Consideration, or is shewn; and how Executory Fees may be limited, is here to be considered, and they are to be governed by three Rules.

- 1. That all Limitations that tend to the Provision of the Family, and to secure against Contingencies that are within the Parties own immediate Prospect, are to be favoured.
- 2. All Limitations that Perpetuate or tend to Perpetuity, are in themselves void

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Per Da void and repugnant to the Policy of the Law.

And therefore it is to be seen what is a Perpetuity.

A Perpetuity is the Settlement of an Cafe of Interest descendable from Heir to Heir, Perpet. 23. so that it shall not be in the Power of Arg. 6. him in whom it is vested to dispose of Pop. 19, it, or turn it out of the Channel.

100. 138,

The Inconveniencies of which are, that 9. 1 And. the Estate is made uncapable of answer- 139, 140. ing the Ends for which Perpetuity is 221. maintained and established; for it puts it out of the Power of the Owner to provide for the Necessities of his Family, or the Extremity and various Changes of his own Affairs out of the Estate; besides it would be of universal Damage to the Common Wealth; for it would flut up all Converse, by making the Way of Communication between Land and Money utterly impracticable; to know therefore how far a Limitation may be allowed, without the Danger of being construed a Perpetuity, 'tis to be considered, what Limitations are confistent with these Rules of Reason and Policy.

First, the Law in all Cases, allows the Limitations of Estates for Life, to Persons in Being; for there can be no Danger in such a Common Limitation,

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nor any Design to Perpetuate; and therefore here the Party is restrained from Alienation farther than for his own Life.

Secondly, The Law allows of no E-flate of Inheritance that goes in lineal Succession; but what is under the Power of that Person to whose Representatives the Estate must descend, and to establish a Right of Succession, and yet to restrain the Power of Alienation is to Perpetuate; and therefore to limit an Estate of Succession, determinable upon remote Contingency, tends to a Perpetuity, since none can purchase with Security, while such a Cloud hangs over the Estate.

Which Rules are equally observable

in Freeholds and Chattels.

## First, In Freeholds.

Cro. Jac. If an Estate be devised to J. S. in Roll. 2. Fee, and if he dies without Issue in the Rep. 196, Life of J. N. then to J. N. in Fee, this Leon. 64. is good; for an Estate determinable up-Dy. 44. on the Compass of a Life, is equally apply. 7. greeable to the Policy of the Common Law, and can't but be as good as the Limitation during a Life; for why may not a Fee be contracted to an Estate for Life, as an Estate for Life be prolonged

Per Holt to a Fee upon a Contingency.

Trin 1697
Dy. 44.

But if an Estate be limited to J. S.

Dy. 7.

in Fee while J. N. hath Issue, RemainVaugh.

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der to J. D. this is void to J. D. for this comes within the Danger of a Perpetuity, and doth not determine within the Common Compass of an Estate for Life.

Secondly, Chattels.

A Grant of a Lease for Years to J. S. Co. 8 R. for Life, Remainder to J. N. is not 95. good to J. N. for as Leases for Years being under the Power of the Freeholder, they are recovered as Chattels, and go to the Executors; and a Chattel can't be limited for Life with a Remainder over; because this would create great Insecurity in Common Traffick.

But in Case of Devises, the Courts of Common Law are governed by the Rules of Equity to support the Intent of the Testator; and therefore since the Time of H. 8. when long Leafes could first be made with Security, a Devise of a Term for Years to one for Life, with the Remainder over, has been allowed, and the Chancery has forced the Tcnant for Life, to give Security to the Remainder Man; but because this was found to multiply Suits and Vexation, it was thought more convenient, that the Tenant for Life should alien according to the Interest he had in him, which was only during his own Life.

But

But the Devise of a Term for Years 8 Co. 87. Leon. 421 in Tail, with Remainder over, is void Lova's to the Remainder-Man, for that, accor-Cafe. I Ro. Ab. ding to the former Rules, would intro-611. Levenstherp duce a Perpetuity.

The Limitation of a Term for Years and Ashley, Not. in Tail, is an absolute Disposition of Reeve's the Term, and it shall go to the Ex-

Cafe. ecutors.

If a Term for Years be limited to a Mod.Rep 115. Bur- Man and his Issue, and if the Man dies ges and without Issue, the Remainder over, this Burges. is void, because the Contingency is not Not. I. to happen till after a Succession. Arg. 4. Sir Will.

Buckhurft's

Cafe.

If a Term be limited to A. for Life, Remainder to his 1st, 2d, and 3d Son in Tail fuccessively, the Remainder to a Daughter, or to B. (a Person in Ese) if the Party hath no Sons; but afterward a Daughter, neither the Daughter or B. shall take this Remainder; for this is an Affectation of a Perpetuity, and is not a Limitation meerly upon an Estate for Life; but it amounts to a Limitation upon the Failure of the Person in the lineal Order to Succeed into the fame Estate.

Not. I. But if it be limited to A. and if he Arg. II, 12. 2 Arg. dies without Issue, to B. the Remain-29. Hale der is good; for here it is not a Limitatifup. Dy. on to the Issue, but upon a Contingen-44, vide Child and cy, which if it doth not happen, it Case, Cro. makes the whole Term vest in the Party Car. 459

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Party; and if the Contingency doth fall, the Remainder-Man has it upon the Determination of an Estate for Life. 2 Not. 1. Arg. 16, 17.

If a Term be devised to A. for 18 Years, the Remainder to B. for Life, the Remainder to the first Issue of B.

this is good.

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If a Term is limited to H. and the Heirs of his Body, and if T. dies with-Norfolk's out Issue in the Life of H. Remainder Case, Trin to C. and his Heirs, this is good; for  $^{34 \text{ Car. 2.}}$  H.'s Term is not taken from him by any Contingency, which must of Necessity happen, during the Life of him in whom the Estate is vested.

Where a long Lease is limited to A. Trin. 21. for 60 Years, if he lives fo long, Re-Car. 2. Wood and mainder to B. his Wife for 60 Years, Saunders. if the live to long, Remainder to C. Pol. 35. his Son, and his Executors, if he outlive A. and B. but if he dies in their Life-Time, leaving Issue, then to the Iffue; and if he died without Issue, living A. or B. the Remainder to D. In this Case, if C. dies without Issue in the Life of A. or B. D. shall have the Remainder; for the Remainder of the whole Term is vested in C. which is not divested out of him, and vested in D. upon Failure of lineal Succession to C. but not till the Death of C. without Ifine, during the Life of A or. B.

A COMMITTEE OF

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### Miles and Trufts. 124

Not. 1. As the legal Estate of a Term may Arg. 4. be devised, so the Trust of a Term

may be limited.

Chan. Rep. 8. Goring and Bickerstaff.

Chan.

Rep. 8.

A Limitation of a Term for Years to twenty distinct Persons in Esse is good; but the Limitation of a Term to A. for Life, the Remainder to the Right Heirs of B. a Person in Ese, is a void Remainder; and after the Death of A. it shall revert to the Donor; be cause this might tend to the Establishing an Estate of Inheritance in a Chattel and putting it out of the Course the Law had fettled for it, whereby it ought to go to the Perfonal Representative.

If a Term be limited to A. for Life, the Remainder is in the Donor; if a Term be limited to A, for Life, the Remainder to the Right Heirs of the Do nor, this is a void Limitation, because

the Reversion is in him.

If the Trust of a Term be limited to A. for Life, the Remainder to B.B. may dispose of the Remainder; but if a Term be devised to A. for Life, the Remainder to B. B. can't dispose of this Remainder; for by the Rules of Common

Ch. Rep. Law, a Possibility can't be granted o Co. 4. R. ver, for a Man that only may have 89. 66, 6, 10. Right, has at prefent no Right in him; and while the Rules of Law fay he has no Right, it is contradictory

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and repugnant, to allow him to act as a Person having Right by transferring an Interest to another. B. in this Case has only a Possibility to have a Right, because the Estate of A. being of uncertain Duration may outlast the Term for Years; but in Chancery, where the Trust is examined, they allow a Man to provide for his present Occasions out of what he may possibly have; and a Purchaser of it shall not lose the probable Advantage, since he hath gi-

ven for it a valuable Consideration.

As to Executory Fees, there is another Difference, where they rise by Way of Use, and where by Way of

Devise.

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there must be a Seizin in Somebody wood and to be executed in the Grantee of the Reynolds contingent Use, whensoever the Contingency happens; for if there be not Cro. Jac. a Person that can be seized of a Use, Moor there can be no Use; and consequently there can be no Execution of it; 742. therefore if a Man covenants to stand
Seized to the Use of himself in Fee, till such a Marriage takes Effect, and then to the Use of himself for Life, the Remainder to his Wife, his Son, Oc. and before the Marriage he makes a Feossment in Fee, Gift in Tail, or

Leafe for Life, upon good Cansideration, without Notice of the Uses, the E. states limited after the Marriage shall never arise; because here is Nobody seized to fuch Uses, and the same Law is of Feoffments to fuch contingent Uses.

Cro. El. But if in this Case he had made a 854. wood and Lease for Years, he would not have Reynolds destroyed the future Use, but only Cro. Jac. have bound it; because there is a Sei-169.

zin, out of which the Ufe rifes; and at Common Law, if the Fcoffees had made a Lease upon good Consderation, as in this Case, it would have bound the Lands, and confequently Ceftuy que Use must have the Profits of the Land thus leased; and in this Case, fince the Statute, the Covenantor has the same Power of obliging the Fce; and therefore those to whom the contingent Estates are limited must take it under the Charge. Quare.

Feoffment to the U/e of A. in Fee, and if B. pays so much, &c. then to B. in Fee; A. devises his Land, and dies, it destroys the 'Contingent Estate; otherwife it is, if he had devised Portions out of the Land, for that could not

A Recovery doth not bar an Execu-Cro. Jac. tory Fee; for the Recoveror with No-592, 3. tice, and without Consideration, is seiz-Seconded to the former Ules.

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Secondly, By Way of Devise; if a Man devises Lands to A. in Fee, and upon such Contingency to B. in Fee, A. makes a Feossment in Fee; this 2 Ro. Ab. doth not destroy the Contingency; for by a Devise, the Freehold it self is transferred, and there needs no Person to be seized to execute an Estate in the Devisee, as must be where a Feossment is made to Executory Uses.

But if a Man devises it to A. for 2Ro. Ab. Life, with a Contingent Remainder; 793. if A. makes a Feoffment in Fee, this destroys the Contingent Remainder; because there is no particular Estate to support it.

Secondly, Contingent Remainders; and here it is to be considered, 1st, In what Manner they are to be executed.

As if a Feoffment be made to J. S. in Fee, to the Use of A. for Life, Remainder to his 1st, 2d and 3d Son, the Remainder to B. in Fee, there are three plain Preliminaries to this Enquiry.

First, There ought to be a Person 1Co. 126. seized to the Use at the Time when the

# i 28 Ales and Trules.

the Use is executed; and this, as is said before, is Plain by the Words of the Statute; viz. If any Person stand or be seized.

Pop. 74. Secondly, The Estate for Life is immediately executed in A. the Remainder in Fee to B. by the Statute; because the Use is immediately in them, and they have the Possession in the same Manner they have the Use.

1 Co.126. Thirdly, No Possession can be immed. Pop. 72. diately executed in the Sons, because they are not in Being; and therefore capable of no Property, neither in Use not Possession.

The Non-performance of all these Rules, caused two false Opinions in this Matter in the Debate of Chudley's

Cafe.

First, Some thought, according to this second Rule, that the whole PosPop. 73. selsion must be executed in A. and B.
1Co. 132, and therefore that the contingent Use,
when it falls, was executed out of the first Livery; and the Estate formerly in Feossees; and this by the Words of the Statute; the Estate that was in the Feossees shall be in Cestur que Use; and hence they inferred, that since the Estate

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Estate was executed by the Power of the Statute, it must be preserved till such Execution by the same Power; and therefore they said, the Contingent Remainders were in Abeyance, and not extinguishable by the Alienation of Tenant for Life.

But this is a Miltake, First, because 1Co. 136. this is contrary to the first Preliminary; 1And.332 for that supposes an Estate in J. S. at the Time of the Execution.

Nature of an Abeyance by the Rules of Law; for if there be Tenant for Life, Remainder to the Right Heirs of 7. S. living, if Tenant for Life dies, or ali-Co.1,1351 ens, during the Life of 7. S. the Remainder is destroyed.

Thirdly, Because it would create a Perpetuity.

Some add another Consequence of a Co.338, this Doctrine, that a Use would rife 9. Pop. 79. out of a Use.

341.P.81.
1Co. 136.

Others held a different Opinion; 139.

and they thought there was an immediate Remainder vested in 7. S.
to serve the Contingent Use when it falls, and that this Estate was deter-100. 129.

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minable upon the Rifing and Execution of the Estate in the Sons, Gc.

But this could not be, First, because this is contrary to the fecond Preliminary. for thereby an Estate is immediately 1Co. 129. vested in A. and B. but by this Opinion, the Estate in B. is only Executory; for it arises to him upon the same Contingency that the Estate of 7. s. rifes, for he could not have a Fee before; for then there would be a double Fee.

Secondly, Because 7, S. would have a Remainder without any Grantor, and iCo. 128. the Law leaves it to Parties to limit their own Estates; and where Nobody has limited an Estate, there can be no legal Limitation.

> Thirdly, If a Remainder be vested in 7. S. he must punish Waste, and enter for a Forfeiture; but the Party defigned him no fuch Benefit, but made him only an Instrument to convey it to others.

> The true Opinion is, that the legal Estate is executed in A. and B. but the contingent Remainders are not utterly lost, because the Possession by the Statute must be executed in the same Manner as the Use is limited; therefore there

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remains a Possibility of Possession to the Feosses, to this Purpose only, that when the Contingency happens, then the Possession may be transferred to the Remainder-Man; and if this is an Estate not known before, and so has no Determination at Common Law, yet it is such a one as must be raised by the Intent of the Statute, and all its Ends could not be answered without it; and therefore to suppose, as in the other Opinions, no Estate in the Feosses, or to reduce it to the Standard and Rules of Common Law is equally false and impracticable.

Secondly, How they may be defeated.

ist. Where there is no Power of Revocation given. 2dly, When there is express Power of Revocation.

First, Where there is no Power of Revocation expressed; since Executory Fees, as is said, and Contingent Remainders tend to Perpetuities, they are construed according to the strictest Rules of Law, and as far as possible, put under the Power of the Estate that supports them.

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And hence came the Diversity between destroying and contingent Remainders, and an Executory Fee.

A Remainder is the Residue of a particular Estate disposed of by the same Conveyance; therefore ex vi Termini it supposes,

First, A particular Estate in Being. Secondly, That individual Estate that was made by the same Conveyance as the Remainder.

Pop. from Thirdly, It supposes an Existence of 70 to 83. this Estate when the other goes out of Being.

Fourthly, It supposes the Estate should remain in the same Manner as it was disposed.

Therefore if a Man makes an Estate ICo. from 120 to to the Use of A. for Life, Remainder 140. to his 1st, 2d, and 3d Son in Tail, Re-I And. from 309 mainder to B. in Fee, and A. makes a to 344. Chadley's Feoffment in Fee, and then a Son is born, the Contingent Remainder is de-Cafe. rLeon. stroyed; for by the Feoffment, the par-352, 3. ticular Estate is extinguished, and afterwards, by the first Rule, there would arise no Remainder of it.

If Lands be given to one in Tail, if J.S. 4 Leon. comes to Westminster, and the Remain-237. der to him in Fee, Tenant in Tail dies,

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the Estate descends on Copartners; they make Partition, tho J. S. does come to Westminster, Gc. he shall take nothing; for the individual Estate is altered, and the Freehold altered by the

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Partition contrary to the second Rule.

If Lands be given to A. and B. for 4 Leon. the Life of C. the Remainder to the <sup>237</sup> Right Heirs of the Survivor; if A. releases to B. the Heirs shall take no-

thing, causa qua supra.

A. feized in Fee devises his Land to Ray. 28. his eldest Son Thomas for Life, and if 1 Sid. 47. he dies without Issue living at the Time 119. of his Death, to Leonard another Son, I Salk. and his Heirs; but if Thomas has Issue 224, 225. living at the Time of his Death, then that the Fee should remain to the Right Heirs of Thomas for ever. Thomas enters after the Death of the Devisor, and fuffers a Common Recovery; it was resolved that the Fee that descends to Thomas immediately after the Death of the Devisor, did not merge the Estate for Life, contrary to the express Words of the Devise; for the Remainder to Leonard must be construed to be a Contingent Remainder, because it is limited to take Place upon the Determination of the Estate for Life; for and can't be construed as an Executory Fee; because K 3

there is no Fee limited to Thomas, but upon a Contingency; and therefore if the Law should construe the old Inkeritance that descends to Thomas, in the mean Time to be a Merger of the Estate for Life, it would immediately have destroyed the Contingent Remainders; for the Estate to Leonard would not arife as an Executory Fee out of the Inheritance, fince that was not devised, but descended; and therefore they construcd the Estate for Life to have a Continuance in Thomas, and that the Reversion did not execute in him; for if they had not construed it to be a distinct Estate for Life in Thomas, there would have been no Foot for a Contingent. Remainder to Leonard; and they could not construe it as an Executory Fee, in Leonard, when there was no Precedent Fee limited to Thomas; and fince it was a Contingent Remainder in Thomas, the Recovery destroyed the particular Estate; and by Consequence destroyed the Contingent Remainder, before fuch Contingency happened. I Leo. fol. II. Plunket and Holmes.

2 Saund. from 380 to 387. Sampion Cafe.

A Man devises Lands to his Wife for Life, and if the has a Son, named Sampson, the Remainder to him and Shelton's his Heirs, the Devisor dies, the Wife takes

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and Vife ikes Law, to whom the Reversion descended, bargains and fells in Fee to the Husband and Wife; a Son called Sampson is born, he shall not take the Remainder; I Sand for when the particular Estate determines by Merger, the Remainder can't vest, and though the Wife had after disagreed to the Purchase, this would only have revived her own Estate, but would never be good to limit on it a new Remainder.

But if it had been by the same Con- 1 Co. 80. veyance, it had been otherwise; as if a Levin. Feosiment in Fee had been made to Bold's Case. J. S. to the Use of a Husband and Co. Lir. Wise, Remainder to the Eldest Son in 28. Tail, Remainder to the Husband's 387. Wise in Tail, Gc. here is a Tail executed in the Husband and Wise immediately; but this doth not drown the Contingent Remainder; but when a Son is born, the Estate opens and lets it in, after the Estate for Life in the Husband and Wise is determined.

For in Equity, the Trusts arose in this Manner, because this appeared to be the Parties Intention by their own Limitation, and the Statute executes the Possession, as the Use is limited.

Te-

Tenant for Life with a Contingent Remainder, Tenant for Life is diffeized Pop. 83. the Contingency happens, the Remainder vests; for since Tenant for Life is put out by Wrong, he has a Right Entry, and in Judgment of Law his Estate continues.

Tenant for Life, with a Contingent Remainder, Tenant for Life is disseized, a Collateral Warranty bars the Contingency; tho' it afterwards happens, during the particular Estate; because no Man can claim that which he is obliged, as Heir, to defend to

another.

2 Ro. Ab. If a Feoffment is made to J. S. to 196, 7. the Use of A. for Life, Remainder to 2 Sid. 64, B. his Wife for Life, Remainder to C. 129, 157. for Life, Remainder to the first Son of C. in Tail, A. makes a Feoffment in Fee, this doth not destroy the Contingent Remainder to the Son of C. for Life, who had a Right of Entry for the Forfeiture; and a particular Estatein Right, on which the Contingent Remainder will depend.

If in this Case, the Wife had entered after the Husband's Death; this could not only have revived her Estate, but the Estate of C. and the Contingent Remainder thereon, which had

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never been put out of Being; otherwife 'tis, as is faid, in Sampson Shelton's Case, if the Contingent Remainder had depended upon the Estate of B.

If in this Case, the Son had been born during the Life of C. and neither B. nor C. had entered, the Son could not, but the Feoffees might; for the Possession of the Feossess must be executed by the Statute in the Son, before he can have a Remainder by the Rules of Common Law; till therefore by the Entry, they have revived the Estate, the Son has nothing; if 7. S. in this Case, releases to the Feoffee of A. or to the Diffeisor, the Contingent Remainder could never vest; for 7. S. could never enter contrary to his own Release.

A. makes a Feoffment to the Use of 2 Ro. Ab. his Wife for Life, Remainder to B. his 794. El. Son for Life, Remainder to him in 630. Tail, that shall be the eldest Issue of B. at his Death; A. dies, the Wife makes a Lease for Years to B. who makes a Feoffment and levies a Fine to 7. S. this does not vest the Contingent Remainder; but if B. dies having Issue in the Life of the Wife, the Issue shall take it; for the Feoffment of B. drowns his own Estate for Life, and is a For-

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feiture to the Wife, and her Entry preferves the Contingent Use, which now immediately depends upon her Estate as if B.'s Estate were worn out by Est fluxion of Time; and if it be the Refidue of any of the fame Estates that were created by the fame Convey. ance, it answers the Notion of a Re-Polletion of the Peoples mulialist

168, 9. 793. Bould v. Wilfon.

Noy 122. A Man covenants to fland feized to Cro. Jac. the Use of his Son for Life, Remain-2 Ro. Ab. der to fuch a Wife as he shall afterwards marry, the Covenantor makes a Leafe for Years; this will not prevent the Rifing of the Contingent Remain der, nor bind it; for the Covenantor has no Power to demife any thing but the Reversion; and consequently the Freehold remains unaltered to support the Contingent Remainder; but if the Covenantor, in this Cafe had referved for himself a Power of making Leafes, this Leafe would have been good; and a Revocation of the former Uses.

Moor 742 3, 4. Lea v. Burton.

Tenant for Life, Remainder to his Wife for Life, and if the be disturbed during her Life, the Remainder to the Wife in Fee, the Husband makes a Leafe to begin after the Wife's Death, tho' fhe be disturbed, she shall not have the Reversion; for the Lease has altered i exec at Eft

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ed it; so there is the same Estate to be executed in the Wife as was in Being at the Disposition of the particular Estate.

If A gives Lands to B for Life, Re-2Ro. Ab mainder to the first Son of B. Re-794 mainder to the right Heirs of B. and 122.

B. makes a Lease for Years; and then a Son is born, this shall not destroy his Estate; for there is the Rent of the same Estate as was limited; for the Freehold it self receives no Variation by the making of a Lease for Years, and if the Remainder to the Son arises, it can't be bound by the Lease for Years; for Tenant for Life had only Power to devise it during his own Life; Quere tamen.

If A seized of a Copyhold in Fee, Ro. Ab. surrenders it to the Use of his last Will, 794. and after devises it to B. for Life, with and Low-a Contingent Remainder; and after B. dall is admitted Tenant, and after he surrenders it to the Lord of the Manor to the Use of his Will, the Contingency happens, B. dies, his Surrender did not destroy the Contingent Remainder; for in Copyholds a Surrender doth not put the Estate out of the Tenant, as it doth in the Case of Frank-Tenements; and therefore there is a particular E-state

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state to support the Contingent Remain.

Hughes Tenant for Life, with a Contingent Rep. 27, Remainder, Tenant for Life Bargains 28.
Case 40. and Sells the Lands in Fee; this doth Hard. 4,6, not destroy the Remainder, for this passes but an Estate for Life, as is said before; and so the Estate of the Bargainee will support the Remainder.

Secondly, Where there is a Power of Revocation.

Co. Lit.

A Feoffment or Fine, &c. with Powwer of Revocation is void at Common Law as to all Power of Revocation; for the Words of Enfeoffing or Granting, Gc. transfer the whole Right, Property and Power of Disposal to the Feoffee, Gc. and therefore for the Party to limit to himself a Power of Revocation, and Disposal is repugnant to the Force of the precedent Words, and would introduce a double Power feated in distinct Persons over the same thing, which the Common Law difallows; but this Rule of Law was fet aside by the same Construction that hath brought in Executory Fees; for when before the Statute Uses were limited with Power to revoke, as the Occasion, Circumstances

ces and Mind of the Party altered it, it was thought reasonable that the Party should have Liberty to Revoke according to their own apparent Intent, by which Uses are ever governed; and since the Possession is executed by the Statute, as the Party had the Use, the Estate continues Revocable.

A Power of Revocation is two-fold; Hard. 43, 1st. a Power relating to the Land. p. Hale.

2. A Power simply Collateral to the Land.

First, A Power relating to the Land is where a Power is limited to one that had, hath, or shall have an Estate or Interest in the Land.

This is again two-fold.

- 1. Appendant or Annexed to the E-Hard. 150 flate in the Land.
- 2. In Gross.

First, Appendant or annexed to the Estate in the Land, is when a Man hath an Estate in the Land; and a Power of Revocation, and the Execution of the Power

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nstances Power falls within the Compass of the Estate in the Lands; as if Tenant so Life with Power to make Leases or Revoke. Grants a Rent-Charge, and then makes a Lease according to his Power, the Lessee shall hold it charged during the Life of the Tenant for Life; for he hath Power to charge his own Interest, which, by his own Act can't be avoided.

And if in this Case, he covenants to stand seized to the Use of a Stranger, he can't, by any After-Act, Revoke the Uses; for since, as is said, the Execution of this Power falls within the Compass of the Estate; so that, unless it be executed during the Continuance of the Estate, it can never be executed; therefore whatever Act passes away the Estate hinders the Execution of this Power of demissing; for a Man can't demise that Estate which he hath passed away to another.

Secondly, In Gross, is where a Man hath an Estate and Power of Revocation, and the Execution of the Power falls out of the Compass of the Estate; as if there be Tenant for Life, Remainder in Tail, with a Power lodged in Tenant for Life to make a Lease for

Hard.416 31 Years, to commence after his Death;

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to raise Portions to his Daughters; this is a Power in Gros; and if Tenant for Life Bargains and Sells the Lands in Fee, this doth not destroy the Power; for since the Execution of the Power doth not fall within the Compass of his own Estate, the selling of his own Estate only doth not hinder the maing Use of the Power.

But if he had levied a Fine, or made Hard. 416 a Feoffment in Fee, this Power had been destroyed, for here he absolutely passes the entire Estate, and divests all the Remainders, and thus, by passing the whole Estate to another, he hath destroyed all the Power of Revocation, and limiting new Uses to his own Benefit; for this Power can't be executed but out of the Remainders; and he hath prevented the Execution of it by having already disposed of the whole Estate to another.

He may Release such a Power of Revot Hard 416 cation to the Remainder-Man; for he that Case is to have an Interest by any Possibility 10 Co.48. may release the same to the present Possesfor, as well as if he had a future Right, for its according to the Policy of the Law, for the Quiet and Peace of the Possessors.

Secondly, Where the Power of Re Hard.415 vocation is simply Collateral.

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And that is, where a Man hath no prefent Interest in the Land, and by the Revocation of the Estate is to have nothing.

In this Case, a Fine or Feoffment of the Land is no Extinguishing of the Parties Power; for tho' every Man is estopped to claim any Interest contrary to his own Act, whereby he passes an Estate to another; yet if a Man makes a Feoffment, or levies a Fine, and then Revokes; whereby a Stranger claims an Interest; the Stranger, who is the only Person that can claim, is not Estopped to claim it; for no Man is Estopped from demanding his own Right by the Act of another; and if there be no Estoppell in this Case, the Stranger hath a Right by the Contract.

And here of the Manner of Revocation.

Ca. Lit. First, If a Man is Tenant for Life, having a Power of Revocation, upon 1Co. 173 Revoking he is feized of his former Estate, without Entry or Claim; for he is in Possession already; and therefore there can be no Entry, and the Claim where the Party is already in Possession is a void Solemnity; for it doth dot make any Change of Property notorious.

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Secondly, If there be Tenant for Co. Lit. Life, with a Power to Revoke the 237. Remainders, and limit new ones, he may do both by the same Conveyance.

For fince upon Revocation the for-Lit.

mer Uses are void ipso facto, without any Solemnity; there is nothing to hinder why the same Conveyance should not create new ones, and the Law to support the Contract will suppose the Destruction of the antient Uses to precede the Creation of the new Uses

Uses.

Thirdly, He may Revoke Part at Lit.
one Time and Part at another; for Ibid.Rep.
this is not entire, like a Condition, for a Co. Lit.

Condition is entire, like a Condition, for a condition is entire, because the Estate must be deseated in the same Manner that it is made; for otherwise the Solemnity of the Entry will not be equivalent to the Solemnity of Livery; but a Revocation is in the Nature of a Limitation, and there is no Solemnity necessary to the Deseating the Estate; and therefore it may be done by Parts; consequently if a Fine be levied of Part,

that is a Revocation only of that Part. Fourthly, The Power of Revocation follows the Estate.

A Covenant to stand seized to the Lee 55,67
Use of B. and his Heirs, with Power Case.
of Revocation upon Payment of Mo-

ney

ney by B. and his Affigns; B. dies, he may tender to the Heir who is in Law the Assignee to this Purpose.

Fifthly, a Power of Revocation is in

fome Cases a Forfeiture.

If there be Tenant for Life, with Power of Revocation over the Estates 1Co.12.b. in Remainder; and the Revocation de-128 10132. pends upon Circumstances inseparably annexed to the Person of Tenant for Life, this cannot be forfeited; but if it depends upon Circumstances, it may be performed by another, the King shall take Advantage of it, and Revoke the Uses; as if the Revocation is to be by Writing under the Parties own Hands and Seals, this cannot be forfeited to the King; but if the Revocation is to be upon Tender of a Ring by himfelf, or any other for him during his Life, this Power is forfeitable.

I Vent. 198. 2R2 Ab. 262.

Sixthly, If a Man makes a Feoffment with Power of Revocation, when he hath executed that Power, he cannot limit new Uses upon the same Feofment; but otherwise it is, if he had a Power to Revoke and limit new ones on the same Feofinent, with a second Power of Revocation, &c. and so in infinitum.

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Secondly, The Execution of Fointures 4Rep. 1. b. by the last Clause of the Statute.

The Original of Jointures was in this Manner: most Lands were fettled in Ule, whereof Women were not Dowable; and therefore the Wife upon Marriage used to procure the Husband to take the Estate of the Feoffees, and fettle it to the Use of him and her self for Life or in Tail, with what Remainder over he pleased; for there was no Confidence at all in those Times in the Dower at Common Law.

Upon the Execution of Uses, there were feveral Maxims at Common Law, which would have given the Wife a double Provision, as that no Right could be barred before it accrued, and no callateral Thing could be received in Satisfaction of a frank Tenant, in which it must have been adjudged, that the Wife must have Dower, notwithstanding her Jointure; and therefore the Statute provides, that the Intent of the Parties in this Change of Property, which is made, should be observed, as that the Wife should not claim both her Dower and Settlement, contrary to Justice.

To make a good Fointure within the Statute, fix Things are regarded 101

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First, The Estate must of Necessity take Effect immediately after the Death of the Husband.

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If the Husband be Tenant for Life, the Remainder to the Wife for Life, this is a good Fointure, tho' not within the express Examples of the Statute, for 'tis within the Equity and Design of it.

4 Rep. Ashton's Cafe.

If the Remainder be limited to the Wife, upon Condition, her Acceptance of fuch a Conditional Jointure makes it good; for this Estate supports the Wife well enough, and 'tis in her Power to continue it during her Life; therefore an Estate durante viduitate is a good Fointure.

If an Estate had been made to the 4 Rep. 3. Husband for Life, the Remainder to 7. S. for the Life of the Husband, to support Contingent Remainders, Remainder to the Wife; this is a good Join-

ture.

Hutton

If an Estate be made to the Husband for Life, the Remainder to the 4 Rep. 3. Wife for a Jointure; this is no good Fointure; for 'tis not within the Words or Intent of the Statute; for the Statute designed nothing as a Satisfaction for Dower, but that which came in the

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fame Place, and is of the same Use to the Wise; and tho J. S. dies during the Life of the Husband; yet this is not good; for every Interest not equivalent to Dower, being not within the Statute is a void Limitation to deprive the Wise of her Dower, and a void Limitation is as if there were none at all.

If an Estate be made to the Use of 4 Co. 2.

A. for Life, the Remainder to the Wife Hob. 151
for Life, this is not good, tho' A. dies
living the Husband.

If an Estate be made to the Husband Hutton for Life, the Remainder to 7. S. for Winch. Years, the Remainder to the Wife for 33. her Fointure, this is not good.

If a Man makes a Feoffment to the Use of himself for Life, Remainder to the Son and his Wife, and the Heirs of the Body of the Son, this is no good Fointure, tho the Wife hath an imme-Ibid diate Franktenement; for to be within the Cases of the Statute, whereby Dower is barred, the Wife must have a sole Property after the Death of her Husband.

A Fointress of Lands mortgaged, and Bertue it was decreed in Chancery, that the Wife and Stile Chan. should pay the Mortgage, and to hold Rep. 17 the Land, not only during her Life, but till she and her Executors be re-paid with Interest.

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A Feofiment in Fee to the U/e of the Feoffee for Life, the Remainder to 1 Sid. 3.4 the Use of his second Son for Life, Remainder to the Use of such Wife as the Son shall take, Remainder to the Heirs of the Son, the Father dies, the Son marries and dies, the Wife is not by this Settlement barred of her Dower; for this at the Time of the Creation, was no certain Provision for the Wife's Life; for the Son might have married and died in the Life of the Father.

2 Bulf. 188. 2 H. 4. Co. Lit.

Co. Lit.

132.

It may be immediately either after the Natural or Civil Death; and therefore if the Husband be banished, the Wife shall have Dower.

Secondly, it must be for Term of her own Life, or a greater Estate, otherwise it doth not answer the Design of the Domer; therefore if an Estate be made to the Wife in Tail or in Fee, this is

36. a good Jointure.

If an Estate be made for the Life or Lives of many others, this is no good Fointure.

Ibid.

A Lease of 100 Years, if the Wife live fo long, or absolutely is no good fointure.

For the Statute provides, that when the Wife hath an Estate for Life by Settlement, she shall be barred of her

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Dower at Common Law; if she hath any greater Estate, she hath an Estate for her own Life included in it; but if the hath any less Estate 'tis out of the Statute.

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Thirdly, it must be made to her self, Co. Lit and not to others in Trust for her, tho' 36. by her Assent, and expressed to be in Satisfaction of her Dower; for the Statute only bars the Dower, when by it the Possession (which was formerly a II(e) is executed in her.

Fourthly, It must be in Satisfaction Co Lit of her whole Dower, and not of Part 36. b. only; for if it be in Satisfaction of a.

Part, 'tis uncertain, for what Part; 'tis in Satisfaction of her Dower: But if it be expressed of what Part, Quere if good.

If an Estate be made to the Wife in Satisfaction of Part of her Dower before Marriage, and after Marriage other Lands are conveyed, wherein it is faid to be in full Satisfaction of all her Dower, if she waives the Lands conveyed to her after Marriage, she shall have Dower for all the Lands of her Husband, notwithstanding the Settlement is in Satisfaction of Part.

Fifthly, It must be expressed to be in Co. L. Satisfaction of Dower. 4 Rep

An Averment is sufficient; for since a. before the Statute, all Lands were fet-

tled

Co. Lit.

tied by Way of Use, it was not necesfary it should be expressed in the Conveyance, that it was in Satisfaction of Dower, fince the Wife was not Dowable of Uses; and if the Heir could not take Benefit in fuch Case by Averment, the Design of the Statute, as to many Ca-

fes, would have been avoided.

A Devise of an Estate for Life cannot Ibid. be averred to be in Satisfaction of a Dower, unless it be expressed so in the Will, for there can be no Averment contrary to the Will, and confequently there can be no Averment contrary to the Consideration implied in every Devile, which is the Kindness of the Testator; and so it cannot be averred, that the quitting of Dower was the Consideration

Owen 33. of this Devise, because 'tis not so expressed. If an Assurance be made to a Woman for her Jointure, and this is not expressed in the Deed but averred, such Averment is not traversable; for 'tis not material by the express Words of the Statute; and therefore 'tis not a neces-

fary Point to entitle themselves to it by

the Benefit of this Discharge.

Sixthly, A Jointure may be made 36.6. either before or after Marriage.

4 Rep. 3. If it be made before Marriage, she is Sole, and as fuch under no Man's Pow-Co. Lit. er; if after Marriage, she takes a Join-36. b. ture

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If before Wife afterv of he her D Dispo the 7 away ture v and th she sh Lands ture, of her cannot of Pro capabl

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may wave it after Coverture; but if she enters and agrees thereto, she is concluded; for tho' a Woman is not bound by any Act, when she is not at her own Disposal; yet if she agrees to it when she is at Liberty, 'tis her own Act, and she cannot avoid it.

If a Jointure be made to the Wife I Bulf. before Coverture, and the Husband and 163. Wife alien by Fine, the Wife shall not 36. b.

afterwards be endowed of any Lands of her Husband's; for fince she quitted her Dower when she was at her own Disposal, she can claim nothing but the Fointure; and that she has passed away by the Fine levied; but if the Fointure was made during the Coverture, and then she relinquished it by Fine, yet she shall have her Dower of the other Lands; for the Acceptance of a Fointure, during the Coverture, is no Bar of her Dower, and she passing it by Fine, cannot be construed as an Acceptance of Property in them, fince that Act is capable of another Construction; (viz.) to bar her of her Dower in those Lands.

The Wife may waive her Jointure 3 Co. 26. by Parol in pais, for the Use may be Pop. 88. limited by Parol at Common Law; and therefore may be devested by Parol; and the 24 H. 8. by its express Words,

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Words, has no Power to execute the Freehold in her when she refuses.

Co. Lit. 29. b.

If an Estate be made to the Wife for her Fointure during the Coverture, the Remainder to 7. S. in Fee, and the Wife waves this Fointure, J. S. shall have the Remainder; for here was a particular Estate at the Time of creating the Remainder; so that it had the Circumstances of · a Remainder, being the Residue of a particular Estate then in Being; and fince the particular Estate was defeasable by an Act that could not hurt the Remainder, the Remainder upon fuch Destruction of the particular Estate comes in Being.

A Man covenants to stand seized to the Use of himself in Tail, the Remainder to his Wife for Life, the Remainder to B. in Tail, and then he makes a Feoffment in Fee to the Use of himself and his Wife for their Lives as a fointure, the Remainder to C. and dies without Issue, the Wife is Remitted; for where a Later, and Defeafable, and a Former, and Indefeafable Title concur in the same Person, there

must be a Remitter.

But in this Case the Wife hath two Titles both waivable by her, the first indefeafable by any third Person; the later defeafable by a third Person;

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Co. Lit. 348. a.

for upon her Claiming by the second Title, she waives the first, and consequently the Remainder in B. commences, and he shall have his Action; and therefore she must be in her former Title to save the Contention and Trouble of the Action.

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But if an Estate be made to the Hus- Co. Lir. band in Tail, the Remainder to the Wife 357. for Life, the Remainder to the Right b. Heirs of the Husband; the Husband afterwards makes a Feoffment in Fee to the Ule of the Husband and Wife for their Lives, the Remainder to the Right Heirs of the Husband; the Husband dies without Issue, the Wife may claim, by which she pleases, and is not Remitted nolens colens; because here are not two Titles, the one indefeafable, and the other defeafable by a third Person, but both equally firm; for the Right Heir of the Hufband, upon the Waiver of the first Eflate, by the Wife, can claim nothing in the Land, contrary to the Feoffment of his Ancestor; and therefore that Estate which the Wife claims is indefeafable, and no Stranger is prejudiced by being put to his Action.

But if the makes no Election, the 2 Ro. Ab. shall be supposed to be in of her elder 422. Estate, because every one is presumed 19. to chuse what is most for his Benefit.

If

## 156 Ules and Trucks.

Cro. Jac. If the Wife has an old Right before the Coverture, and afterwards takes a Jointure of the same Lands she shall be Remitted.

Hob. 72. An Estate settled to the Husband for Life, Remainder to the Wife for a Jointure, except such of the Lands as the Husband should devise, this Exception is repugnant to the Grant; because the Settlement might be avoided by the Husband devising the whole.

#### Of Pleading Jointures.

Hob. 72. In a Writ of Dower the Tenant pleads a Jointure in Bar of Dower, and concludes that the Wife claimed after the Coverture, by Force of the Jointure, the Wife makes a Title to the fame Lands by another Conveyance, and concludes her Replication without traversing the Claim alledged in the Bar; but the Tenant cannot rejoin, that the Wife claimed by Force of the Jointure.

Wife claimed by Force of the Jointure, Cro. Jac. without traverling her Claim by the Title alledged in the Replication; and the Reason of the Difference is this, the Claim by Force of the Jointure alledged in the Bar is out of Time, and idly pleaded; and therefore requires no Traverse; for by the general Words of the Statute a Jointure is a good Plea in Bar of

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of Dower; but there is an Exception Hob. 72. in these Words, provided if the Lands be assured, during the Coverture, she may have Liberty to refuse them; so that the Wife, to avoid the Bar of the Statute, must plead that she is within the Exception of the Statute; for the must shew what is for her own Purpose and Advantage; but when she sets up a Claim by another Conveyance in the Replication, the Tenant cannot plead a Cro. Jac. Claim by the Jointure without tra-490. versing her Claim by the other Conveyance, because the Matter must be brought to Trial when any Difference in Fact is stated; and he that denies the Fact of any thing properly and fitly pleaded must draw to the Issue by

Of the Wife's Alienation of her Jointure.

offering a Traverse.

By the 11 H. 7. 20. If a Woman hath an Estate in Jointure or in Dower, and aliens by Recovery, or otherwise, he that hath an Interest, and to whom the Land ought to belong, may enter as if the Woman were dead, without Discontinuance or Recovery.

A Use at Common Law, settled by the Husband on the Wife for her Join-

ture,

ture, is within the Intent of the Statute: for tis an Hereditament within the Words of the Statute; and tho' the Statute speaks that it must be by Difcent or Purchase of the Husband; yet it must be an Use newly raised to be within the Law; because 'tis Part of the old Estate which the Husband had

by Difcent or Purchase,

Since the Execution of Uses, an Use fettled in Marriage on the Wife by the Husband, is within the Statute; for it comes within the express Words (given to the Husband and Wife, by any feized to the Use of the Husband) for every one is Party to an Act of Parliament; and therefore the Feoffees transfer their Interest in the Manner that it is settled.

A Woman feized of Lands in Fee Simple takes a Husband, and has Issue a Son, and she and her Husband levy a Fine of her Lands with a Grant, and Render back to them both in special Tail, the Remainder to her Right Heirs, if the Husband dies, and the Wife after levies a Fine of these Lands, this is no Discontinuance within the Statute; so if a Woman conveys Lands to the Ancestors of her intended Husband, who re-conveys it to the Husband and Wife in Tail, the Wife, after the Co-

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the CoCoverture may alien; and yet be out of the Danger of the Statute; for the Statute intended to redress the Mischief of the Wise's Alienation of the Husband's Lands, and these were originally her own.

If Lands be settled to the Use of the Husband and Wife in Tail special for her fointure, the Husband dies, the Wife Aliens in Fee, the Issue may enter in the Life of the Wife; for by the 1 Rich. 3. c. 1. the Acts of Cestur que Use shall bind the Feossees, and according to his Title and Interest in the Lands; so that the Feossee of a Use in Tail might have entered after the Discontinuance of Cestur que Use in Tail, without being put to their Formedon; and therefore if the Statute of H.7. did not give an Entry in the Life of Cestur que Use in Tail, it would be to no Purpose.

Husband and Wife, Tenant in Tail Brown's Special, Remainder to the Heirs of the Cafe. Husband; the Husband dies, the Issue Rep. 5. levies a Fine, and by it grants all his Interest to J. S. the Wife makes a Lease, for three Lives, not warranted by the 32 H. 8. J. S. may enter immediately, and oust the Lesse; for J. S. is the Person that has an Interest, and to whom the Lands ought to belong; for the Fine concludes the Issue of the Tail;

by

by the 32 H. 8. 36. a Fine levied of any Lands intailed to any of the Ancestors of the Conusor is a Bar to all Intents and Purposes, and the Remainder is granted by the Common Law; fo that 7. S. hath the next immediate Interest, and consequently may enter for this Alienation in the Life of the Wife.

If the Wife be Tenant for Life of the Husband's Lands, the Reversion to the Issue in Tail, and Tenant in Tail suffers a Recovery by Diffeizin of the Wife, and then the Wife releases to the Recoveror with Warranty, the Wife dies, the Issue in Tail dies leaving Issue, his Issue shall not avoid the Collateral Warranty of the Wife; for if the immediate Heir inheritable, either before, or at the Time of the Alienation, confents upon Record, he is not within the Benefit of this Statute by the last Proviso; but if after the Alienation of the Wife, the Issue in Tail had released upon Record, this had been no Bar of the Tail; for when the Issue has any Right as Tenant in Tail, he cannot by his Act bar his Issue, Westminst. 2 C. 1. and since the Statute de Donis is not repealed by express Words, a Confent to part with any Right accrued to Tenant in Tail, is within the Verge of the Statute.

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## Mices and Truffs.

There is a Difference between this Statute and the 6 of R. the 2: for there the next of Kin to the Person ravished shall enter, and by the Words of the Statute, shall hold it Jure Hareditatis; and therefore if a Daughter entered and held it Jure Hareditario, the Son born afterwards shall not divest it; but here the Statute says, That the Person that has Interest shall enter and hold it; and therefore if a Daughter enters, a Son born afterwards shall divest it.

Thirdly, Of the Cases out of the Staitute, and they are two-fold.

- i. Where Uses are limited upon Uses. 2. Where the Uses of Terms are li-
- 2. Where the Ujes of Terms are li-

First, Where Uses are limited upon Uses; if a Man bargains and sells his Lands to A. to the Use of B. the Statute cannot execute the Use in B. for by the Bargain and Sale, which implies a Consideration, there is a Use in A. and before the Statute it was impossible that two distinct Persons should have the Use of the same Land.

And by the Statute, the first Use cannot be executed in A. since there could not be two plenary Possessors, and the fe-

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162 cond Use being contrary to the Difpol vaugh 5 the Chancery that looks upon the Inte Chan.Ca. rest of the Parties in Conveyances, conftrues A. only as an Instrument to take the legal Estate, and that in Conscience he is bound to answer the Trust to ? which he hath taken; Quare tamen, the Confideration moves from A.

If a Man doth Enfeoff another w the Use of 7. S. and his Heirs, and up on this Confideration, that if J. M. hall pay so much Money, then the said J. and his Heirs shall be seized to the U of F. N. and his Heirs, J. N. pays the Money, the Use is not executed in him by the Statute, causa qua supra; but the Court of Chancery will undoubt edly support such Trust.

A Devise supposes a Consideration, 4 Rep. 4. and therefore it cannot be averted to any other Use than to the Use of the Device, for that were an Averment contrary to the Defign of the Will a pearing in the Words.

But if an Use be expressed, it shall 2 Vent. be to the Use of Cestuy que Use, and 312. will execute; for the Will has only implied Ufe, where no other is limited and Expressum facit Cessare Tacitum,

2 Vent. But if Lands be devised to A. during 312. Bur the Life of B. in Trust for B. the Ro cher v. mainder Durdant.

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mainder to the Heirs of B. now living; this is a Chancery Trust in B. and not executed by the Statute; for this was the Design of limiting an Estate to A. that a Tail might not be executed in B. whereby he might have a Power to dock it.

Secondly, Where the Uses of Terms are limited out of the Statute; see before; and these Limitations are two-fold.

First, Of Such as wait on an Inheritance. Secondly, Terms in Gross.

First, Such as wait on the Inheritance: The Case
The Original of this was in the Time of Bishop
of Queen Elizabeth, when Mortgaging ton's Araby Way of raising Terms was invented; gument,
and then if a Marriage Settlement was
made, or a Purchase upon valuable
Consideration, and the Mortgage was
discharged by the Purchase-Money, or
the Marriage-Portion, it was thought
sit to take an Assignment of the Term
in Trust to the same Persons to whom
the Inheritance was limited, to protect it
against latter Mortgages.

And hence it is that the Inheritance Case of was limited in Tail, with Remainder Perpetusities, 3, 4, M 2 over, 6, 11.

over, the Trust of the Term might be limited in the same Manner; and therefore if the Tail was docked by Fine and Recovery, the Trust of the Tail and Remainders ceased, and attended the Inheritance in Fee, for the Trusts could not protect or attend these Estates that were not in Being, and the Trustee, who is but an Instrument to protect others cannot have it to his own Use.

The Intailing a Term is not within the Statute de Donis Condit. for that Ibid 3.11. Statute extends only to Estates of Inheritance, and not to Chattels, which the the Rules of Common Law have car-

ried into another Channel.

And therefore in this Case the Trustee and Tenant in Tail may dispose of it Ibid.3.11. without a Fine or Recovery; and this upon valuable Consideration, will bind the Issue; because, since the Chancery are not bound by the Statute, they are at Liberty to direct the Rules of Equity, and 'tis not Equity to set up the Trust to the Issue when the Ancestor has received for it a Valuable Consideration.

states Debts, for all Chattels of Intestates are Assets at Common Law; and 'tis not Equity to direct it otherwise.

But if the Inheritance of an Use be intailed, the Alienation of Tenant

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in Tail, will not divest it out of the Is-Co Lit.]
suc, for 'tis within the Intent of the 'co.
Statute de Donis, which says that if an Estate be thus limited, the Donee shall not alien to prejudice his Issue; and the Chancery in interpreting Mens Contracts, is bound by the Intent of an Att of Parliament.

If a Term be given to A. in Trust Duke of Norfolk's for B. in Tail, with Remainder over, Case. attendant on an Inheritance, and A. sur-Not. 1. renders to B. this shall not destroy the Arg. 3. Remainder; for the Surrender destroys the Estate at Law, yet the Trust remains in Equity, if the Party had Notice.

But in Case, if A. or B. had aliened case of upon valuable Consideration, without Perpet. 11. Notice, this would have destroyed the Equity of the Issue and the Remainder Man.

Secondly, Terms in Gross. Of Executory Trusts, or Terms in Gross, is already spoken in the Law of Executory Trusts.

If a Lease be limited in Trust, and Chan.
the Trustee renew the Lease, it shall be Rep. 191.
to the Benefit of Cestur que Trust; for
if the Trustee takes on him the Trust,
he takes upon him to act for the BeneM 3 fit

fit of the Party to whom the Advantage of the Term was originally de-

figned.

The Father made a Trust for his Will, and devised 500 l. to each of the Daughters, payable at their full Age or Marriage; or if any or all of them died before, then to others; the Trustee out of this cannot allow Maintenance to the Daughters, tho' they have no other Maintenance, because the whole is devised to others; and therefore, if the Trustee deducts any Part of it, they do not follow the Intent of the Will.

Where A. since the Statute of the 27 of H. 8. enfeoffed B. in Fee to the Use of himself and his Heirs, during the Life of C. then to the Use of the first Issue Male of C. in Tail, so on to the tenth Issue; then to the Use of D. in Tail, then to the Use of F. in Tail,

Remainder to the Use of the Right Heirs of A. B. enfeoffed C. before the

deration; and having Notice of the Uses, afterwards, on a Trial between the Feoffee of C. and his Issue, this Matter came in Question; and the Point of the

gent Uses are destroyed by the Feoffment to C. and it was resolved that they are. In handling this Case, I shall

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fiff endeavour to thew, that C. the Feoffee of B. did not ftand feized to the former Ufer notwithstanding the Fcoffment was made without Confideration, and he had Notice of the Uses; for this Feoffment divelts all the Estate out of others, and by it B. gained a new Estate in Fee by Wrong, which he passed over to C. fo that C. is not feized of the old Estate, subject to such and súch Uses, but he has a new Estate that is subject to no Uses, because not expresfed or limited; and the Law, by Confruction, will not make his Estate subject to Uses annexed to an old Estate, now gone and only remaining in Right; for were the Land chargeable with the Ujes into whosesoever Hands it came, this would be a Perpetuity; for by limiting a great many contingent Uses, . and charging the Lands with them ratione possessionis, into whose Hands soever it came; and it being in the Power of Nobody to bar and defeat these contingent Ujes (as it cannot be) (were the Lands charged into whose Hands soever it came) with them, all these Inconveniencies, the necessary Confequences of a Perpetuity, must need follow. Therefore a Use was not a Thing at Common Law annexed to the Pofsession of the Land, but the Privity of M 4 Estate;

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Estate; therefore the Chancery did not

charge all the Persons that had the Lands, but only those Persons that came into the Lands by Privity of Estate, and with the Trust and Confidence at first reposed in the Tertenants; and that for the Reason aforesaid, lest they might encourage Perpetuities; and they construed in a Court of Equity, the . Pl. 19. Limitations of Uses, as those of Estates in Possession were at the Courts of Common Law; for the Changery would not fet up a Rule of Property distinct from that at Common Law, especially in Cases so inconvenient; for if the contingent future Uses might not be do stroyed as well as contingent Remain ders; then by the Limitation of them, an Estate of Inheritance would be so fettered, that Nobody would meddle with the Purchase of it; and what Reafon can there be affigned, why a contingent Use cannot be destroyed as well as a Use in Ese, which was daily destroy ed, and that by the Construction of the greatest Equity; for if the Feoffee to an Use, had for good Consideration en feoffed another who had no Notice, the Use was destroyed, tho' the Feoffee came in by Privity of Estate; and this for the same Reason, for if the Land were charged with the Use into who Hands

Bro. 338.

nor

lid not Hands foever they came, the Inconveniencies of a Perpetuity would immead the came diately follow; for who would meddle with Lands, that they could with no Estate, Possibility know whether it was chargnce at ed with a Use, or not; for that it might nd that t they be limited in fo fecret and private a Manner, that it were impossible to d they come to the Knowledge of it. Therey, the Estates fore fuch Feoffee stood feized to his own Use; and the only Remedy for the forrts of mer Cestuy que Use, was to complain would in Chancery of the Feoffee's Breach of distina Trust. So if Diseizor had entered upecially on the Feoffee, he had not stood feized he conto the Use, Gc. but the Feoffee must be de have entered, and then have revived the If the Heir emain-Use, which as it seems to me, he might a Trustee them, be compelled to do in Chancery; and to defeat be fo if he had stood seized to the Uje, he the Trust, neddle bis Eftate would have been punished by Law, as is notwithit Reaa Wrong-Doer, for taking the Estate, standing continand those Profits to himself he had no subject to wellas the Truft. eftroy-Right to; and yet would have been an- D. Norf. of the swerable to the Cestur que Use for the Ca. 14. Profits, as was the Feoffee; belides he e to an came not in Privity of Estate, and fo on en: ce, the was not liable to any Contract or A-Feoffee greement made by other Perfons concernad this ing those Lands he claimed not by or from any of them; neither was any Land Confidence reposed in him. An Alienee, 1 Co. 122. who

Hands

nor Person Attaint, were not capable of having any Lands to the Use of on the same of having any Lands to the Use of on the same of having any Lands themselves, is subject to an Use. For the Benefit of any but the King; Hard 468 the Person Attaint is only capable to

Hard.468 the Person Attaint is only capable to have a Purchase of Lands for the King's Use and Benefit, and that excludes all others; neither can an Alien have Lands and then he cannot be feized to an Ule. A Corporation cannot, by the Common Law, be seized to a Use; for in their Constitution, they are a Body of Men collected by Force of the King's Letters Patent, to fuch Intents and Purposes; all which are only for the Benefit and Advantage of the Corporation: And therefore they cannot have Landsas a Corporation (which implies to the own Use and Behalf) to the Use of another; for they we not at first created to that End, and they having no Power as a Corporation, any other than they receive by Force of the Letters Patents; and by that they being constituted only to fuch and fuch Ends they want Power as a Corporation, to take Lands to the Use of other People, for that is an End Nobody could think of, in the Erection of a Corporation; neither shall the King stand seized to a Use, for all the Lands he is seized of,

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he is seized in fure Corone, for the Maintenance and Support of his Crown and Dignity, and the well Government of the Common Wealth, which is a Use the Law designed him primitus, and consequently its exclusive of all other Uses: Neither can it be imagined that the King should in Point of Honour stand seized of Lands only to the Benefit and Advantage of another, and 2Ro.780. so be a Sort of Bailist to him.

Tenant by the Courtes, or Tenant in Dower cannot be seized to Uses, be-Hard. 469 cause they come to these Estates by the Disposition of Law, for the Advancement and Encouragement of Matrimony; and those Estates are given them for their own Maintenance, and are consequently exclusive of all other Uses,

for the Advantage of other People.

Quere if at this Day an Estate be Quere. given to a Man and his Heirs, to the Use of him and his Heirs, in Trust for another and his Heirs, whether the Woman shall be endowed without any Trust; for if she be not, then here will be an Estate of Inheritance in Fee Simple, so settled that no Woman can have Dower of it; for a Woman is not dowable of a Trust; ideo Quere. Lord by Escheat cannot be seized to an Use; for he comes in and claims above the

Use, by a Condition in Law secretly annexed to his Estate in its Commencement ; viz. That, if the Feoffee died without Heir, he should re-enter: and fo he claiming in by Force of a Title Paramont to the Use, shall never be subject to any Charges that take their Rife and Date from an inferior Time and Title.

Besides he has the Land in Satisfaction for his Services that are now gone; but what Satisfaction will it be if he is still to hold the Land charged with

the Use.

A Man possessed of a Term in Trust for another, is attainted of Treason; the King is not subject to this Trust, 2

Roll. 780.

Otherwise of Tenant in Dower; because she comes in in the per, by the Assignment of the Heir, and not in the post, as Tenant by the Courtesy. I Inft. 239, or Bro. Feoff. Uses 338, a. makes a Difference between Dower at Common Law, and ad offium Ecclesia, and ex Assensu patris; for they are by express Assignment.

Where A. Feoffee to the Use of B. grants a Rent to C. who has Notice of the Use, he shall hold the Rent to the Use of B. and if A. enfeoff D. without Notice, and B. after Stat. R. 3. re-

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leases to D. by this the Rent of C. is extinct. Bro. 337. Co. 10. 14 H. 8. 4.

If Feoffee to Use grants to J. S. or Common, this ex Natura Rei could not be to the Use of Cestury que Use. Bro. 338. 10. See Contingent Remains

ders. 3. b.

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Where a Feoffee to Use makes a Lease for Life or for Years, or a Gift in Tail, either with a Rent reserved, or without, tho' the Lessee or Donee have Notice of the former Uses; yet he shall not stand seized to those Uses but to his own. Bro. 339. 47. 340. A. 1 And. 314. If a Seigniory be held to the Use of A. and the Tenancy escheats, that shall be to the Use of A. so if Feoffee to an Use vouches and recovers in Value, he shall be seized to the sirst Use. Bro. 238. pl. 10.

Where a Feoffee to Use enfeoffs another upon Consideration of Blood, that Feoffee shall be seized to the former Uses; but 'tis otherwise, if the first Feoffment were in Consideration of Blood. 2 Roll. Ab. 779. 3 Co. 81. 2 Ro. 781.

2 Leon. 15. Dy. 340. b.

Where J. S. is a Feoffee to the Use of A. in Tail, Remainder to B. in Tail, Remainder to the Right Heirs of A. and the Feoffee and A. join in a Feoffment to three, (two whereof have No-

tice

fhall be seized to the new Uses; for A had a Power over his own Estate for Life and in Fee; but the two Feosfees ought to make Recompence to A for the Loss that every body else sustained.

Hob. 349.

If a Feoffee to an Use doth enfeof one upon a valuable Confideration, who has Notice of the former Uses to express Uses, he shall stand seized to those express Uses, and not to the former Uses. Hob. 349. 2 And. Bro. Feoff. d Uses, 340. Dy. 341. b. 1 And. 313. Bu Quere if a Reversion be subject to fu ture Uses, and is granted to a Man and his Heirs without Consideration, to the Use of the Grantee and his Heirs; yet whether 'tis subject to the former 2 Roll. 79. Dy. 340. b. 2 Roll. Ules. 796. 2 Sid. 124. 157. 64. A. agrees with B. to make him a Lease of Black Acre for Years, then makes a Feoffment to C. upon a valuable Confidoration, who has Notice of the Use, he shall be compelled to make it. 2 Roll. 781. Pl Com. 351. 1 Co. 122. B.

Feoffee to an Use cannot appoint a Bailiff without the Consent of Cestus que Use; nor allow him Fees unless the Cestus que Use be an Infant. Bro. 338

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Thus have we shown how Uses in Esse were destroyed at Common Law, and by Consequence how those that are Future, and which 'tis uncertain whether ever they will come in Esse, may be destroyed; for the same Arguments that hold for the Destruction of present Uses, hold good for the Destruction of suture Contingent Uses: For if he that Co. 121. comes in of another Estate, than that which the Feosfee to the Uses in Esse; by the same Reason, neither shall he be to suture and contingent Uses.

The fame Law is of Corporations, Aliens, Gc. If then a Use be not a Thing annexed to the Land, it will be asked Conufee of of me, What it is? To which I answer, a Stat. that a Use is an equitable Right to have to Uses. the Profit of Lands, the legal Estate Bro. 338. whereof is in the Feoffee, according to ". 10. the Trust and Confidence reposed in him, which equitable Right also extends it felf to those that come to the Lands in Privity of Estate to the Feosfee, and under the same Trust and Considence that he did; fo that, to every Use two Things are incident; a Confidence in the Person, and a Privity of Estate; and when any of these failed, the Use

was either suspended or destroyed.

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A Use is defined by my Lord Coke to be a Trust and Considence, which is not issuing out of the Land, but as a Thing collateral, annexed in Privity to the Estate, and the Person touching the Land.

iCo. 131. The acknowledging a Statute by b. Bro. 339. Cestuy que Use, was the same Thing as making a Lease within i R. 3. and Hard 495 therefore the Feoffee's Land was ex-

i Co.131 tendable upon it.

Ules were to some Intents reputed in Law as Chattels, and therefore were devisable; for the Court of Chancery, in the directing and judging concerning Uses, always made such Construct tions as were most reconcilable to the Intent and Will of the Parties, where no Inconvenience would follow; there fore it appearing to be the Intent and Design of the Parties, that the Use should be to the Devisee, they adjudged it in him; yet there was a Possessio fratris of a Use, and it was intailed ed within the Statute de Donis, Gu for Reason would that the Sister of the whole Blood should have the Use before the Brother of the half, for the same Reasons as hold good in Freeholds, and the Chancery in Equity supported the Will of the Donor; so if the Use should come to his Issue, for that the Intent

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Intent of the Parties is there a great Direction for the Guidance of the Judgment; Uses were neither Assets to the Heir or Executor, their original Institution being for such Intents and Purposes, that no Execution, Gc. might be had of them. But Quere why in Equity, they should not have been liable to Execution, Gc.

It may be asked, What this Privity f Estate is, that is requisite to the landing seized to an Use? And it is when a Person comes into the same Estate the Feosfee to Use had in and v Contract with him, for a Diffeisor omes into the same Estate, but not by Contract and Agreement; and therefore e is in the post; i. e. claims not by or from the Feoffee: And why a Privity of Estate is requisite to the standing seizd to a Use, has been already accounted or in a great many particular Cases: But in general, 'tis because he that comes ot in Privity of Estate claims not the Estate by and from the Feoffee, who tood seized to the Use, and consequenty claims not the Estate as it was subcat to the Uses; but one above that clear nd free; and he that claims an Estate y no Contract or Agreement with the feoffee, but either by Title above his, br by the Disposition and Gift of Law, N cannot

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cannot stand seized; for this would in a Manner defeat his Title, and frustrate the Benefit of the Estate the Law gave him, and why should a Man stand seized to an Use when he claims not the Estate by Agreement with him that did stand seized, or has not the Estate that was charged to the Use; for Confidence in the Person is as well requisite as Privity of Estate; for so first began Uses. by enfeoffing some Friend to the Use, in Dy. 340.b. whom the Feoffor reposed a Confidence and Trust; and if the Feoffee performed not the Trust, the only Remedy for the Cestuy que Use was to punish him for his Breach of that Trust. But where there is no Trust, there can be no Breach of Trust, and consequently no Punish ment for it; of Necessity therefore wherefoever the Trust and Confidence fail, the Use is gone, because the Re medy is gone; and before we have shewn feveral Reasons why the Usa must cease, the Lands not being charge ed with them ratione possessionis, for the Danger of a Perpetuity; but only the Person being charged, is respondent d the Privity of Estate, and Considence reposed in him. Confidence in the Perfon is either express or implied, and if that fails, the Use is gone; as if a Feof fee to an Use, for good Consideration,

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doth enfeoff one who has not Notice of the Use, the Use is gone, for here is no Trust in him; he not knowing that there were any Uses, no Trust could be reposed in him to let the Cestuy que Use take the Profits; but if he had Notice, a Trust might well be faid to be reposed in him, because he took the Land, knowingly, with the Uses: If the Feoffment had been without Consideration, the' he had no Notice of the Use; yet he stood seized to the Use, for the Law implied Notice of the Use, and so there is a Trust; and this introduces no Manner of Inconvenience in charging him with a Use; because he loses nothing, having given no Confideration; for he would be seized to the Use of the Feosfor, if no Use were limited, and then the Feoffor must be answerable for the Value of this Use to the Cestuy que Use, which would be a vain Security. It seems, tho' this Feoffment were to Uses expressly, yet the Feoffee should stand feized to the old Uses, because he came to the Lands, without any valuable Consideration, and perhaps the first Feoffee to Use was not responsible for his Breach of Trust; but the other Case of a Feoffment, with Consideration, without Notice of the Uses, is widely different from this; for were he is charg-N 2

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niencies of a Perpetuity instantly follow. For the Limitation of Uses may be so fecret, that it is impossible to know of them, and then who would purchase Lands; fo that of Necessity, Land would be fo fettled, that it would not be in the Power of the Tertenant to dispose of it, but it must necessarily remain in the Family which is a Perpetuity. There

ed with all the Uses, all the Inconve

Plow. Com.350.

is a Diversity taken in Plowden between the Feoffment of the Feoffees and of Cestur que Use; for if the Cestur que Use for Life or in Tail made a Feofment in Fee, either with or without Confideration, all the old Uses weredifcontinued, and the ancient Estate which the Feoffees had, is gone, and they have a new Estate subject to these new Uses created by the Feoffment; for when Cestury que Use made a Feoffment in Fee, which by the 1 Rich. the 3d. he might lawfully do, he passed a Use in Fee Simple to the Feoffee; which being a new Use to the Feoffee, all the old Uses were discontinued, and consequent ly the Estate of the Feoffees must be altered; for were it the ancient Estate, it were still subject by the former and elder Limitation of Uses to the old Uses; therefore have the Feoffees, by Construction, a new Estate to the new Uses;

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but if the Feoffees themselves had made a Feoffment without Consideration, the Feoffees had stood feized to the old Uses, for here was no Use nor new Estate; but as it seems they both agree upon the whole, for if one have an Estate for Life to the Use of another. and he makes a Feoffment in Fee, (and this is really the Case of Cestur que Use) the Feoffee shall not stand seized to an Use, for he has a new Estate, and not the old one subject to Uses. whether, by the Feoffment of Ceftuy que Use, only a Use passed, or whether the legal Estate passed; for it seems by Plowden, that only a Use passed; but by 1 Co. Consequence the legal Estate passed, 132. a. which, as it seems, is Law; the Lands Trusts were liable in the Hands of the Feoffees made Afto an Use to Execution for the Debt of Jets, by Cestuy que Use; and for Relief and He- 2 Cap. 3. riot after the Death of Ceftuy que Use, after the 19 H. 7. c. 15.

Having thus shewed, that by the Common Law, such a contingent Use as in
the Case first put, had been destroyed by
the Feossement, we come now to shew
the 27 H. 8. did not intend the Preservation of them; for the very End and
Design of that Act upon Consideration of the many Mischiefs and Inconveniencies that had been introduced by

N 3 Uses,

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1 Co. 124. Uses, was utterly to extinguish and suppress them; if therefore it should be construed so far in the Favour of Uses as to support and preserve contingent Uses in these Cases, where before at Common Law they were utterly destroyed, the Act would be expounded against the End of its Sanction, and all these Inconveniencies it was made to fuppress, would be still in Being; for who could be fure of a Purchase of Lands, when by the Limitation of a future Use in a secret Manner, which by no Ad could be destroyed or defeated, he should loofe his Land; when that came in Play, the Makers of the 27 H. 8. c. 10. thought 1 Co.125. that after that Act, no Land could pass by

Way of Use, but by Common Law, which was the Way they defigned to retrieve and bring in an Use again; and therefore they provided by a Salvo for the Right of all others, that they had before the making of that Act; yet they provided no Salvo for any body's Right after the Statute; but feem to give all Lands that are feized in Trust to the Cestur que Trust, without any Manner of Provision for the Rights of other People; therefore if A. do diffeize B. fince the Statute, and makes a Feoffment to C. in Fee, to the Use of D. in Fee, the Right of B. is not faved

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by the express Letter of the Act, for that gives the Land to D. without any Manner of Salvo for the Right of B. but by equitable Construction the Judges have faved the Right of B. since that Way of Conveying is in Use, which the Makers of 27 H. 8. thought would be no more in Practice; and therefore made no Provision for the Right of those after the Act; but this the Makers of the A& took for granted; for the Way of conveying by Use is not any Ways prohibited by the Act, but only the Possession executed to the Use. Therefore this Manner of Conveying not being prohibited, and being much practifed, the Salvo for others Right is absolutely necessary for every Man's Safety; but because the Makers of the Act thought the Way of Conveying by Use, would still be used by Way of Bargain and Sale, that that also might be notorious, and on the same Level with Common Law Assurances, they afterwards, at the fame Parliament Enacted, That they should be enrolled; and this shews, that the Intent of the Law-Makers was not to shew any Manner of Favour to Uses in Esse or Contingency; and as the Preservation of contingent Uses is clearly out of the Intent of the Statute, fo it is out of the Remedy of the Body of the Act NA

Act provided against the Mischiefs that were before the Act; for the only In. tent and Design of the Act is to execute the Possession in those that have the Use; fo that to the Execution of every Ufe within the Intent and Meaning of the Act, it is necessary that some body should be feized to the Use of some other Perfon; fo that if there be no Person seized to the Use, there can be no Execution of the Use, by the Force of the Statute, and there must be a Use in Ese, and not a Right of an Use only, for the Words of the Act are, That every Person that has, or hereafter shall have a ny Use, &c. So that the Use must be in Ese, in Possession, Reversion or Remainder, and the Cestuy que Use must be in Ese; for the Words of the Act are, Stand seized to the Use of any Person or Persons; for how can the Act execute the Uses to the Possession, if there be no Person to take the Use in Being; and the Estate of the Fcosfee, must vest in Cestuy que Use; for the Act says, "That the Estate of such Person seiz-" ed to an Use shall be adjudged in Cestuy que Use": And when any of these fail, there can be no Execution by Force of the Statute; and this Construction is absolutely necessary, that the Words of the 27 H. 8. may have their full

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full Scope and Meaning; fo the Makers fs that of the Act did wifely in making no Pronly Invision for Uses in futuro; for if they execute had, all these Inconveniencies at Come Ufe; mon Law had still remained, and Perry Use petuities had been preserved by the Li- 1Co.78.6. of the mitation of contingent Remainders, not should to be destroyed; Estates would have been er Perso fettered, that no body could have dif-1 feized posed of them; so that the Statute haecution ving made no Provision for these Remainstatute. ders, they are left to the Construction Te, and of the Common Law; and then the conor the tingent Remainder in the Case first put ry Perhad been destroyed for the Reasons behave a fore, when we treated concerning these 2 Leon-It be in Remainders at Common Law: If there 259. emainbe no Seizin, in the Feoffees, when the It be in Act are, Use comes in Esse, it cannot be execu-Per on ted, Crc. and if the Feoffees be barred of their Entry and Right to come at exe-Seizin, the Possession can never be exeif there Being; cuted to the Use; were the Lands charg-, mult ed with contingent Uses, into whose Hands foever it came by Force of this et fays, Statute; then a Corporation Disseisor of on feizdged in the King, &c. should stand seized to the any of Use, as before has been shewn they cannot; and the Nature of the Use would ation by now be quite altered; for before it was is Conhat the a Trust and Confidence in the Person, now it would be a Sort of Attendant ve their

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on the Land, or annexed thereto; and then it were a new Hereditament; by Construction of this Statute, the Heir of the Part of the Father, should have the Use, tho' the Lands moved from the Mother's Side; and this would be contrary to diverse settled Resolutions. If

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2 Inf. a. there be a Tenant for Life, the Remain-<sup>1</sup> Co. 127. der in Fee, and the Remainder-Man covenants, that if the Tenant for Life shall die in four Years, he will stand seized to the Use of 7. S. in Fee, and the Tenant for Life makes a Feoffment in Fee, the Feoffee likewise covenanting to stand seized to the Use of 7. N. if the Tenant for Life dies in four Years. the Statute cannot preserve and execute both these future Uses at once; therefore one of them must be toll'd, and then the Statute has not the Effect to preserve future Uses. Before the Statute if the Feoffee had bargained and fold, and made over no legal Estate to the Bargainee, no Use had passed; for the Privity of Estate and Confidence remain; and therefore the old Use continues. But then it may be objected, if future

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contingent Uses are not preserved and all executed by the 27 H. 8. how can the Possession be ever executed to them, fince the whole Estate is out of the Feoffees. To this I answer, that only

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that Estate is executed to the Use, by ; and the 27 H. 8. that has the Requisites bent; by fore-mentioned to the Execution of a e Heir Possession to an Use; and it is impossible d have a future Use should have the Possession om the executed to it by the Statute, when 'tis e conuncertain whether it will ever come in ns. If Esse or no: But the Feossee has a Possiemainbility to stand seized to the Use, and an cowhen the Use itself comes in Ese, then 1Co. 129. Life the Possibility is come to a Certainty; **Itand** viz. an Estate to the Use of Cestur que e and Use, and so is executed by the Statute; ffment but if the Estate of the Land be alterenanted by a Diffeisin or Feoffment, so that Fine and 7. N. the Possibility of the Feosses is suf-Nonclaim Years, pended, there he must enter to revive; way their xecute the future Use is absolutely destroyed, Entry. 1 Leon. thereand no Estate remains in the Feoffee, 258, 259. , and for the Benefit of a future Use; ect to for then, if a Feoffment were made to tatute the Use of a Man for Life, and then to fold, the Use of his first Son, not yet born, o the in Tail, the Remainder to B. in Fee, e Prihe would be a Tenant for Life, the nain; Remainder to the Feoffee and his Heirs; inues. as long as the Sons should have Heirs of future their Body, the Remainder to B. in Fee, and and so there would be a Fee upon a Fee, can and the Feoffee might punish the Tehem, nant for Life for Waste, or perhaps enf the ter for a Forfeiture, when perhaps the only

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contingent Remainder would never come in Ese: So that of Necessity he must have nothing but a Possibility, which when it comes in Ese, is such an E. state in him as may ferve to answer the future Use, and be executed to it accordingly, by Force of the Statute; for as he had a whole Fee to fuch Uses, so the Statute parcels out of his Estate, according to the Uses; and as there had been no Execution of the Possession, he must have stood seized to the future Use, when it came in Ese: So now the Statute gives that Estate in Possession to the Use, when it comes in Ese, as it does to Uses in Ese presently. But if when the future Use comes in Ese, there is an Estate adjudged in the Feoffee, it may be asked what Estate there is in him, or what Estate did he gain when i Co.129. he enters to revive a future Use; for his old and antient Estate he cannot get when that is executed by Force of the Statute in others. It feems that in both Cases, he has but such an Estate as may ferve to be executed by Force of the 27 H. 8. in the Cestuy que Use; for he cannot divest the Estate lawfully vested before by the Force of that Act of Parliament. So that if the future Use be for the Life of Cestuy que Use, when this comes in Ese, it seems the Feoffee has a legal

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never flity he which an F. ver the accorfor as fo the accord been e must Ufe, he Stafion to as it But if , there ffee, it e is in when for his ot get of the n both is may of the or he vested Parliabe for n this

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a legal Estate to him and his Heirs, during the Life of Cesty que Use, which is that Instant executed in the Cestuy que Use, by Force of the Statute; the same Law is, if he had entered to revive the Use; so if the Cestur que Use had an Estate Tail in the Use, the Feosfee shall, when this Use comes in Being, have an Estate to him and his Heirs as long as the Cestuy que Use has Heirs of his Body. Then it may be asked, How he can have fuch an Estate which is a Fee, and yet many Estates Tail, and a Remainder in Fee expectant upon it? But it may be answered, if he hath it only of Necessity, that the Cestur que Use may have an Estate Tail in him, which is eo instanti executed in him, the Thing being momentaneous; and fo there can be no Manner of Objection made of the Inconveniencies following upon the Limitation of a Fee upon a Fee; there must be an Estate in the Feoffees to serve the future Use; for the Statute fays, That the Estate that was in fuch Person, Gc. should be adjudged and deemed in him that has the Use, &c. so that of Necessity, some Estate must be adjudged in the Feoffee, that it may 1 Co. 129. be executed by Force of the Statute; a. Plow. Com. 352. and the' the Feoffee hath a particular 100. 137. Estate in the Land by his Entry without 4.

any Donor, this is not any Absurdity, it being done by Force of the Statute, the regularly at Common Law, no such Estate can be created. No Limitation of a Use is good, but where the like Limitation of an Estate in Possession were good at Common Law; for the Design of 27 H. 8. was to revive the ancient Common Law, and this Construction must be allowed of Necessity; for now the same Reason that had forbidden, such a particular Limitation of Estate in Possession at Common Law, forbids

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in Possession at Common Law, forbids the like Limitation of a Use; because the Possession is by the Act executed to 2Co. 138. the Use; therefore must the same Inconveniencies necessarily ensue; so that if a Man makes a Feossment to the Use

a Man makes a Feoffment to the Use of one for Years, Remainder to the Use of the Right Heirs of J. S. who is living, this Use limited to the Heirs of J. S. is void, for the same Reason as if an Estate had been made to one for Years, Remainder to the Right Heirs of J. S. because that the Freehold is now here, so that there cannot be a Tenant to the Pracipe, (yet this were good of a Use at Common Law) and so if any one hath a Cause of Action, he may be delayed of his Right, and the like Inconvenience there is in a Use so limited;

for no Estate is left in the Feoffee, as be- 1Co. 135) fore has been faid, but only a Possibility. ". So in all other Cases, the Execution of the Possession to a Use, is construed according to the Rules of Common Law, because the same Reasons hold there. So if a Feoffment be made to the Use of A. for Life, and then to the Use of her who should be the Wife of B. A. dies, B. takes a Wife, the shall take nothing because a contingent Remainder ought to vest at Common Law; either during the particular Estate, or eo Instanti that the particular Estate determines. perhaps in both these Cases at Common Law, the Chancery might have fupported the Use in Remainder, because there was no Inconveniency in it then, as there would be now. "Tis objected, that if a Privity of Estate is requisite, then no future Use can be executed by the Force of the Statute; for when the Statute has executed the present Use in Ese, they are in the Post, that have the Use so executed; and so are not Privies in Estate to the Feoffee, from which the future Uses may arise. To this I answer, that the Statute requires that these Estates that were limited by Way

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160. 130. Way of Use in the same Convey. ance with a future Use, and were executed by the Statute, should still remain and continue till the future Use comes in Esse; and this Privity of Estate is, where two Persons have an Interest created by the same Conveyance in one Estate, by one Conveyance; because then they come to one Estate by a Contract or Agreement, to which both are Parties and Privies, (i. e.) conusant; and why the Estate should continue till the future Uses would arise, we have already accounted for, to prevent the Danger of a Perpetuity; and for many other Reasons; which see before. All Statutes, that have been made in suppressing the Inconveniencies arising from Uses, have always been extended by Equity 1Co. 138. beyond the Letter of them. It was a. 135. a. the Opinion of some Judges, in Chud-136. 6.

ley's Case, that the future Uses, limit ted upon a Conveyance were in A beyance; and also the Estate being executed to them by Virtue of the Statute, it was one entire Estate in Abeyance. But the other Judges for

very good Reasons were of a contrary Perswasion; for the Statute, as before

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has been faid, extends only (by the very express Words of it) to execute the Posfession to the Use where the Use is in Esse, and not to a Possibility of a Use, and what Ground can there be for an 259. equitable Construction to carry an Estate in certain to the Possibility of an Use, when the Words of the Statute warrant no fuch Expositions; so that a future Use, notwithstanding the Statute, remains as it was at Common Law, 'till it comes in Ese, and then the Statute executes the Possession to it. It was also held in Chudley's Case, that future Ules must not arise out of the Estate of Cestur que Use, but out 1 Co. 132 of the Estate of the Feoffee; therefore a. if A. doth infeoff B. to the Use of C. and his Heirs, and if D. should pay C. 100. then C. should stand seised to the Use of D. and his Heirs, this Use to D. is void, not being raised out of the Estate of the Feoffee; the Reafon of which Resolution seems to have been, that he that stands seised to an Use must come in in Privity of that Estate to which the Use is annex'd; but here the Cestuy que Use comes in by the Statute, and fo in the Post; but now it feems to me that the Limitation to D. would be supported as a Chancery Trust, since they have tound

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found out a Way to creep out of the Statute, if a Feoffment be made in Fee to the Use of the Feoffee and his Heirs in Trust for 7. S. and his Heirs; Quare, Whether this Estate be not exe-Poph. 81. cuted in 7. S. by the Statute; for as it feems, the Feoffee is in by the Common Law; and fo the Statute not fa-

tisfied; fo that it feems the Way of Bargain and Sale is good to raise a Trust; yet it was adjudged that if a

Man bargain'd and fold his Lands in Fee to one, to the Use of one for Life, with other Limitations of Uses to 0thers, that they were void, because a

Use could not be limited of a Use, which is the only Reason of the Case

next before.

Feoffee to an Use of a Manor releases to the Tenants, they cannot have the Services to the Use of Cestury que Use, because they are drowned; and there can be no Trust without an Estate in Being. Bro. 138. a. But it feems in fuch Cases, they would be compelled by the Court of Chancery, to answer the Rents to the Cestury que Use. Duke of Norfolk's Case, 14. 2 Co. 78. b.

Sir Edward Cooke being obliged by Order of the Council-Table, to make a Settlement of his Estate in this Man-

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her, (that is to fay) to covenant to fland feized to the Use of himself; for Life, then to the Use of Elizabeth Hatton, his Wife, for Life, then to the Use of his Daughter Elizabeth, for Life, for a Moiety of those Lands, and then to the Use of her Sons in Tail; till the Tenth Son, and then for the other Molety to the Use of his other Daughter Frances, for Life; then to the Use of her first Son in Tail, and so on 'till the Tenth Son, with Cross Remainders to each of the Daughters, if the other died without Issue, then to the Use of the Right Heirs of Sir Edward Cooke; yet that he might have it nevertheless in his Power to defeat or preserve the contingent Remainders to his Daughters Sons, for which End he covenanted to stand seized, and so no more was out of him than what was vested in the Cestur que Use, and did not make a Feoffment to Uses, and put the whole Estate out of him, and put it in the Power of the Feoffees to preserve or destroy them, as it was in Chudley's Case; but here he makes a Lease to one for Years, and then grants his Reversion to another in Fee. without confidering, that fo he coming in in Privity of Estate, under the Confidence Sir Edward had, might stand

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feized to the future Ufes, that the E state of Sir Edward was subject to, and Case then he makes a Feoffment in Fee to emain others; so that had he feen Reason to pard fuppress these future Uses, he would reyard have destroyed the Deed of Grant of out C the Reversion, and trump'd up the Estate Deed of Feofsment; but had he seer Sir Es any Reason to preserve the Remain Trust ders, he would have suppressed the Feost hat the ment, and shewed only the Grant of his the Reversion; but none of these to be Things being done it became a One sted Things being done, it became a Que ftion between the Feoffees and the Son of one of the Daughters, (the other dying without Iffue) and 'twas refolved Opera in Favour of the contingent Use, and fo against the Feoffees; a particular Te nant having entered after the Feofment made by Sir Edward, but 'twas agreed that if Sir Edward had made a Feoffment before he made a Grant of the Reversion, the future Uses had been destroyed; for then the Feosses had come in of another Estate, not of that subject to the Uses, as was before shewed in Chudley's Case, the future Uses were to have arisen out of the Estate that Sir Edward had in him, as in the Case of the Feosfees it doth out of their Estate; and if he had passed away the whole Fee then, as in the

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to, and Case of the Feoffees, a Possibility only Fee to emained in him, then when Sir Edeason to pard Cook grants away, by legal Conwould revance, his Estate to another, with-frant of put Consideration, the Grantee of this up the Estate being in the Privity of Estate, he see Sir Edward had, and under the same Trust and Considence, implied by Law he Feost hat the suture Uses may well rise out that the state. The next Thing then these to be considered is, what is to be operated to the Destruction of those future the Son Uses, by the Feoffment that Sir Ede other ward made, and that can have no resolved Operation to their Destruction; for and so though he thereby discontinued all the lar Te Estates, and the Feosfee stood subject to the new Uses, yet when the particut 'twas lar Tenant entered, then all the Estates again were recontinu'd, and consequently the Estate of the Grantee of Sir Edward, was again subject to the future Use; but this Lease made by Sir Edward would have bound the future Ules, though not the Remainder Men, because the future Uses were to arise out of the Estate of Sir Edward; and so far as that was defeated, so far was the contingent Uses; and had that been wholly destroyed, the future Uses had been fo too. If a Man Bargains and Sells Lands to one for Life, then 3

to his first Son in Tail, who is not yet born, it feems this is a good contingent Remainder, rising out of the Estate of the Bargainor; but 'tis said by Judge Nudigate; that by Bargain and Sale only, no contingent Use can be supported, it feems he means by the Estate of the Bargainee; but Que re, Whether it may not, ut ame, but it seems a Feofiment or Fine is the furest Way, and so to put it out of the Power of the Owner of the Land to destroy the future Uses. Quere, Whether the Consideration given by the Party in Uses will create a Use to one not in Elle.

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Years, grants it over to B. and C. and their Assigns, to the Use of A. and his Wife, and the longer Liver of them for Y. A. grants away to another such In Conu terest as he then had in the said Lands Gc. and it was adjudg'd that A.'s Gran that was void; for he had nothing but a Barga Dyer Trust, which he could not assign over We page 1369. for a Trust cannot be assigned over, be had so cause it lies in Privity; and though A ever 14 Inst. 85. may repose a Trust and Considence is the Lessee, yet his Assignee, that is not an an an an an analysis. Party to the Agreement, cannot do is A. Fe because not privy (i. e.) not conusant of Heirs nor Party to that Agreement; where sells

not yet tingent Estate said by ain and can be by the it Que t ante, Fine is at it out of the

by by the Contract between the Parties, a Trust was reposed in the Tenant of the Land; for though he might be willing to stand intrusted for the Benefit of his Friend, it does not therefore follow that he would for every Body's Advantage. But it feems to me, in this Case, that if A. had assigned over the Land itself, it would be good by 1 R. 3. but the Words he used were not fufficient to pass the Land itself, for he had no Interest therein; Quare, for 27 H. 8. executes no Possession to iven by Use, but where some Body is seized a Use to the Use of another for Years, Life, Poph. 76 c. fo that the Tenant must have a Freehold in the Land, else the Statute of C. and executes no Possession to the Use; but and his if a Fine be levied to the Use of one of them for Years, then it is executed, for the fuch In Conusee of the Fine is seized. A Man d Lands Bargains and Sells his Land for Years, that is executed by the Statute, if the Bargainor had a Freehold for only a gn over We passed at Common Law, and so over, be had stood seized to an Use; and whathough A ever Interest the Cestury que Use has in sidence is the Use, 'tis executed by the Statute, hat is not say Body be seized to that Use. not do is A. Feoffee to the Use of B. and his nusant of Heirs before the Statute, Bargains and where sells the Land to C. and his Heirs, 0 4 no

I Inft. 271.6. 272. 4.

no Use had passed to C. for there cannot be two Uses of one and the same Land, and the Use of B. continued, for the Privity of Estate and Trust and Conf. dence remained, and therefore did the Use of B. prior to C.'s Title; for Uses cannot be destroyed nor altered without a Transmutation of the Possession, by which the Privity of Estate, or the Trust and Confidence is altered and gone. The fame Law is of Covenants to stand seized.

A. covenants to fuffer a Recovery of fuch Land to the Use of B. and his Dyer 362. Heirs, rendering to A. an annual Rent of 421. it was held that upon the Recovery A. shall have the Rent executed in him, by 27 H. 8. c. 10. and may distrain for the Rent; for though there be no Clause of Distress nor Covenant; for the Recoveror was seized to the Intent another should have the Rent; and though the Appointment of the Rent was after the Limitation of the Uses; as if the Design was that the Rent should issue out of the Estates executed by the Statute; yet that is not material, for the Intent being that a Rent should Issue there, such Construction shall be made ut Res magis valeat quam pereat.

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But if A. diffeizes B. to the Use of Cand his Heirs, and then Bargains and Sells the Lands to D. a Use will pass to him; for though A. committed the Disseisin to the Use of B. and his Heirs, yet has B. no fuch Use as can be executed by the Statute, viz. an equitable Right to take the Profits; for a Diffeizor cannot stand seized to an Use, there being no Privity of Estate, nor Confidence, and fo no Ground to fubpana him to Chancery; and they cannot there take Notice of his Title; for they are not to determine the Right of Inheritance; but the Disseisin being done to the Use of C. it seems he may enter upon B. and have the Lands, tho' he have no fuch Use as is to be executed by the Statute. 'Tis regularly true, that if the Cestuy que Use enters upon the Feoffee, he was a Trefpassor; yet in some Cases, by Intendment of Law, he might enter and occupy the Lands at the Will of the feoffee; therefore if a Man before the Statute made a Feofiment in Fee, to the Intents to perform his Last Will, yet might the Feoffor enter and occupy the Land at the Will of the Feoffee; and fo as it feems, in the Case of a feoffment to future Uses, the Feoffor might enter and occupy at Will. If

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the Feofiment were made without Consideration, as the Case is to be intended; for the Law gave the Peoffor and his Heirs a Use till the future Use came in Ese; and a Use is nothing but a Right to take the Profits to that End: therefore it gave him Leave to enter and occupy the Lands at the Will of the Feoffee; and so as it feems from Lit. Sett. 464. may his Heir do after him, and in giving him the Use in the mean Time, till the future Use comes in Ese, it gives him Leave to take the Profits. But then 'twill be objected, If the Law gives not a Man Leave in Cafe where there is a Use expresly limited to him, but makes him a Trespasser, how can it give him Leave to enter, Gc. where there is no fuch express Limitation to him? To which I anfwer, that where the Law by Intendment gave him an Entry to occupy at Will, 'tis but to give him Leave to take what the Law gives him; but when a Use is expresly given to a Man there to give him Leave to enter, is to make a Construction quite contrary to the Meaning of the Parties expressed in their Deeds, by which it appears, that the Feoffee was to have the Poffession and Occupation of the Land, and to answer over the Profits to the Ceftuy

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Pofand, the Cestur que Use; so that the Difference is this; in the one Case there is but a reasonable Construction made to let a Man have that presently which he would have at the long run, that is to fay, the Profits of the Land, when there is nothing repugnant to fuch Construction; in the other Case to expound the Entry of the Feoffor to be lawful, is to make a Construction quite contrary to the plain Intent and Meaning of the Parties fully expreffed, which would be to introduce all Manner of Uncertainty in the Exposition of Deeds. Where the Will of the Parties ought to be supported, if no Inconvenience follow from it, it appears by Lit. Sect. 464. what Uses 1 Co. 40. were at Common Law; for there he a. fays that Ceftuy que Use should be a 272. Juror, if the Land were worth 40 s. per Aun, therefore when the Statute ordained that a Juryman should have 40s. per Ann. the Judges construed it according to the Common Law, that Cestur que Use should be the Person, and not the Feoffee.

Tuhọ

## Who may have a Afe.

All. 316. If an Use be limited to an Alien, Bro. 339. he cannot have it, but it is forfeited to Stiles 40. the King, who cannot feize the Lands, Hard.495 but may have a Subpana to get the Pro-Bro. 338. fits or the Estate executed to him. The King cannot have a Use, because

29. 1 Co. 23, he cannot take but by Matter of Record; but if the Use be found by Office, up-1 Hern. on Record, then he may take. 132.

If a Use be limited to the Poor of the Parish, 'tis good, though they are

no Corporation.

Vid. post is rejected.

When a Man makes a Feoffment in where this Fee, to the Intent to perform his Last Distinction Will, and afterwards devises the Lands to another, and dies, the Devisee is in by the Will; but if a Man makes a Feoffment in Fee to the Use of such Persons, and of such Estate as he shall

2 Inft. 471. appoint by his Last Will, and then limits the Use, by Will to another, the b. 112. a. Devisee is in by the Execution of Uses 6 Co. 18. upon the Feoffment, by the Statute; and the Reason of the Diversity seems to be this, in the first Case, he having limited no Uses, and having a Use to him and his Heirs, the Feoffment in both Cases being made without Con-

fideration, the Statute executes the Estate

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state fully in him again, and leaves nothing in the Feoffee; but in the latter Cafe, there being Uses expresly named, tho' the Feoffor had his Estate again, yet there is a Poffibility left in the Feoffee, which becomes an Estate when the Contingency happens: But then it will be objected that the first Feofment e Probeing made upon Trust and Confidence to perform his Last Will, this was a Use in Contingency; and so there is the same Reason for this Case as for the other; but it may be answered; That this is no Use; or if it were one at Common Law, yet that 'tis now destroyed by the Feoffee, who can never perform the Trust reposed in him, because the Estate is presently by the Act out of him, at Common Law, it might be a Use, for he had an Estate in him, fo that he could perform the I Inft. 19. Will of the Devisor; but in the other 2 Roll. Case the Will is but a Direction of 780. the Persons and the Estates they shall cro. Jac. have according to this Power reserved 1 Rol. upon the Feoffment, and there upon the Rep. 333. original Feoffment there was nothing a. ite; for the Feoffees to do. — Tenant in Moor Tail cannot stand seiz'd to an Use; for Cont. the Intent of the Statute De donis 2 And 87. was, that he should have the Lands Vide and the Profits of them, and he cannot 2 Roll. onexecute

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execute the Estate to the Use, and therefore cannot answer the End of the Creation of Uses, (viz.) that the Tertenant should make Estates according to the Directions of Gestuy que Use; and it appears by the Intent and Scope of the Act; that the Makers did never intend that the Tenant in Tail should stand seized to an Use, for they have restrained him to alien to prejudice his Issue; but if he were to stand seized to an Use, as it was a Part of the Trust reposed in him to make Estates according to the Direction of Cestuy que Use; fo it would be a Prejudice to the If fue; and the Statute would never have fo carefully preserved the Land to the Issue, if he might have it only to another's Use. If a Bastard hath gotten a Name by Reputation, to be fuch a Dyer 374. One's Son, yet 'tis not a Consideration fufficient to raise a Use to him; for still in Law, he is look'd upon as nullius filius; therefore the Law can never support that as a good Use to him, as the Son of fuch one, in respect of the natural Affection that a Father bears to his Sons, when by another Maxim the Law supposes, and fays, he is nullius filius; and so no Body can have any natural Affection for him.

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A Man levies a Fine, and cove-2 Co. 75. and nants by Indenture, in Consideration of b. 76. at of the natural Love and Affection, Blood and Ter-Marriage of his Bastard Daughter, that ording the Conusee shall stand seized to the Use; Use of the Bastard Daughter, tho' this Scope be not a fufficient Consideration to raise never 4 Use upon a Covenant, yet 'tis expreshould five of the Intent of the Party; and ve retherefore shall serve as a sufficient Dee his claration of a Use upon the Fine, ted to where there needs no Consideration. Truft Uses, (as has been said) may be raised ccordeither upon the Transmutation of Pose Ule; fession, as upon a Fine, Feossment or he If-Recovery, &c. or where there is no r have Transmutation of Possession, as upon a to the Covenant or Grant upon good Confideo anration, as upon a Bargain and Sale, otten where there must be quid pro quo, uch a fomething given for fomething; but if ration in a Covenant there be but a good r still Consideration, though nothing be given, ullius it is sufficient; and here it will be nerequisite to see what is a good Consile to deration to raise a Use upon a Covein renant. And first, in the Case of Shernat a rington and Pleadale ver. Strotton, it y ancame to be a Question, Whether a Co-, and venant in Confideration that the Lands so no should remain to the Heirs Male of ection the Body of the Covenantor, and in

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Confideration of Brotherly Love and Affection; and that the Lands should remain in the Blood of the Covenantor, were fufficient to raise a Use; for 'twas objected that 'twas not, because no Advantage came to the Covenantor by that Consideration; for 'twas unneceffary, and 'twas no more than was before, and would be afterwards; but the Court did adjudge that the Uses did well rife upon those Considerations, and in the Resolution they seem to have regard to each of these Considerations, as if any of them fingly were fufficient to raise a Use, as indeed they feem to be; for as for the first, in Consideration, that the Lands should remain to the Heirs Male of his Body, he covenants to stand seized to the Use of himself for Life, then to others for Life, and then to the Heirs Male of his own Body; this it feems is a fuffcient Confideration to give him an Estate 'Tail, tho' he does not part with his Estate; and so in other Cases it would remain in him, as before; as if a Man makes a Feoffment in Fee to the Use of J. S. in Tail, the Remainder to his own right Heirs, he has his old Reversion in him; but here the Consideration of preserving the Lands to the Heirs Male of his Body, by the Creation

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Creation of an Estate Tail; and so ha- 1 Inft. 22. ving the Force of the Statute De do-7Co. 13.6. nis to preserve the Inheritance; for the If I Vent. fue being a good Confideration to raife 372. a Use, that Estate, which the Owner 495, 505. of the Land had, is changed and quali- 13 Co.55. fied into an Estate Tail. Accordingly 2 Mod. my Lord Coke fays, that if a Man makes a Feoffment in Fee to the Use of one for Life, the Remainder to the Use of the Heirs Male of his own Body. this is an Estate Tail in him; yet here the Uses were not out of him; so that a Man may modify a Fee that continues in him; but he cannot take a Fee as de novo, when he has the old one In the Case of Pybus and in him. Mitford, it was held, that if a Man covenanted to stand seized to the Use of his Heirs Male, begotten on the Body of his fecond Wife, he had thereby an Estate Tail.

A Father makes a Feoffment in Later Aufee to his Son, with a Letter of Attor-thorities ney to make Livery, but no Livery is cline that made, no Use shall arise to the Son; this shall for it appears to be the plain Intent of a Covenant the Parties, that the Land shall pass by to stand the Common Law by the Feoffment; seized, and that the Feoffee should be in the Per, and it would be unreasonable to

make fuch Construction as to raise a

Use, and so make the Son come in by the Statute; and in the Post, contrary to the express Agreement of the Parties mentioned in the Deed. It feems the Diversity taken before, came in by a Construction made in Favour 6 Co. 18. of Lords, upon the 32 6 34 H.8. to hinder the Disposition of one third Part, When the Feoffment was made to the Use of the Feoffor's Last Will, this was expounded to be no more than referving a Power to dispose of the Land by Will, which, as Owner, he might do before, and not that he design'd himfelf to raise a particular Authority to limit an Use to this or that Person, upon the Feofiment; fo the Feofiment being made without Confideration, was to the Use of him and his Heirs; and therefore when he disposes of the Land, tho' he did it as having a Power by the Feoffment, yet the Will took Effect, as he was Owner of the Land; but this Distinction seems to me to have no Manner of Reason or Ground for it, in any fair Construction. When a Man

makes a Feofiment in Fee to the Use I Inft. of fuch Persons, and of fuch Estate as 111, 112. Hob. 312. he shall appoint by his Last Will, the 6 Co. 18. Feoffor is in the mean time seized of a qualified Fee, and has a double Power I And. over the Land, either as Owner of it 245.

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to dispose of it by Will, without ta-, king any Notice of his Power referved upon the Feoffment, or by limiting Uses and Estates, according to that particular Power. If therefore he devises his Lands by the Will, generally, it takes Effect as if he were Owner of the Land; for having Liberty to chuse whether he will make any Use of the Power reserved to him upon the Fcoffment, and yet having Power, as Owner of the Land to dispose of it, when he devifes it generally without any Relation to his Power, it feems his plain Intent was to waive the Execution of the particular Power he had upon the Feoff ment, and to make Use of the general Power he had as Owner of the Land; and now fince the Lands are of Socage Tenure, devisable by Will, in every fuch Devile by Will, the Devilee would be in by the Will, tho' fomeimes, in Case of Knight-Service, Lands were otherwise; as if after such Feoffnent, or by fuch Feoffment of three cro. El. Acres, he had disposed of it to A. 878. nd afterwards by Will generally had evised the third, the Dévisée had cen in by the Feoffment, and not by he Will, because as Owner of the and he was restrained from making my Devise at all; and therefore that

the Will might be of some Effect. (which was most certainly the Devisor's Intent) it was expounded, and that most reasonably to be a pursuing of his Authority according to the Power referved to him upon the Feoffment; but if he had made no Disposition of the Lands, but only as general Owner of them had devised them, there, because the Will was of Effect to pass two Acres, the Devile was void for the third.

A. fuffers a Recovery to the Use of his Last Will, if he declares Uses by Deed in the mean Time; yet they are revocable, being founded on a Recovery fuffered to Uses that were alterable at the Will of A. therefore in fuch a Case he may either declare new Uses, or if he makes a Lease for Years, that shall bind the Persons no minated by the Declaration of the Uses to the Will. Hob. 349. Bro. 337. h 19 H. 8. 12. Dyer 166, 324.

T Co.175.

In an Action on the Case for slandering his Title, the Defendant pleads that one Sir Henry Sharington was feized of the Lands whereof, Gc. and had Issue three Daughters, and covevanted with others, in Consideration of a Tointure to be made to his Wife, the Advancement of his Issue Male, if he

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he should have any, the Preferment of his Daughters, and the Continuance of the Land in his Blood; and for divers other good Confiderations, to stand feized of the Lands E.G. of fix hundred Arcres, to the Uses, Intents and Purposes, and under the Proviso enfuing, (viz.) to the Use of himself for Life, and after of Three hundred Acres in certain, to the Use of his Wife for Life, for a Jointure, and of the other 300 Acres after his Death; and of the other Three hundred limited for his Wife's Jointure, after both their Deaths, to the Use of the Heirs Male of his Body engendered; and for Default of fuch Issue, then of the Three hundred Acres not limited for his Wife's Jointure to the Use of his three Daughters severally, and the Heirs of their Bodies; and for Default of fuch Issue to the Use of the right Heirs of Sir Henry; and then there was the like Limitation of the other Three hundred Acres; and if any of the faid three Daughters die without ffue, then her Portion to the Survivors by Moieties, Remainder to the Right Heirs of Sir Henry, and then comes this Proviso: Provided always, and it is covenanted and agreed beween all the said Parties, that it shall P 3 be

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be lawful for the faid Sir Henry, by his Will, in Writing, to limit any Part of the faid Lands to any Person or Persons, for Term of Life, Lives or Years, for Payment of his Debts, performing of his Legacies. Preferment of his Children, or any other reasonable Consideration, as to himself shall be thought good; and all Persons thereof seized to stand seized to the Use of such Persons, and for such Interests as shall be so limited after by his Will. Afterwards Urfula, the eldest Daughter died without Issue: Afterwards the faid Sir Henry, by his Will in Writing, for the Advancement of his Daughter Oliffe, and her Hufband, and the Heirs of the Body of the faid Oliffe, limited a great Part limited to Grace, to the said Olife, for 1000 Years, without referving any Rent; and afterwards the faid Sir Henry died without Issue Male, and fo the Defendant justifies his faying, that Oliffe and her Husband had Right to the Lands; and upon this Plea the Plaintiff Demurs, and this Limitation for 1000 Years was adjudged to be void, and confequently the Defendant had flandered the Plaintiff's Title; and fo Judgment was given for the Plain tiff; and that by the Opinion of all the

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the Justices in England; and that upon these Grounds and Reasons. Tho' 1 Co. 176. upon a Feoffment, Uses may be limited without Confideration, yet they cannot by Covenant or Bargain and Sale; and the Reason seems to be this, when a Man made a Feoffment in Fee, without Confideration, and without expressing any Uses, whereby the Feoffee came into the Land for nothing, it was thought very reasonable and equitable that the Feoffee coming to a considerable Estate, without giving any thing in exchange for it, should stand feized to the Use of the Feoffor; for that feemed to be the Intent of the Parties, it not being to be imagined that any Man would give away an Estate without any Manner of Reason or Consideration for it; but when upon the Feoffment Uses were expresfed, then these express Uses were supported, tho' the Feofment, Fine, Gc. were without Confideration, because that feemed to be the plain Intent and deliberate Design of the Parties, that the Estate should be settled according to those Limitations; and there would be no Equity in overthrowing fuch a Defign; but in a Covenant of Bargain and Sal, no Use can be raised without a good Confideration; tho' there be Ules

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Uses expressed; for in a Feoffment it is Equity that gives a Use, tho' there be none expressed; and the same Equity will not support any Use by Covenant or Sale, tho' expressed, if there be no Reason for it, as there is not in a Bargain and Sale, without Confideration. But it may be asked, fince Uses on a Feoffment, if expressed, may be supported without any Consideration, why may not Uses upon a Covenant, Gc. if expressed, tho without any Confideration, be supported too? To which it may be answered that if a Feoffment be made in Fee, without Consideration, the Feoffee hath a legal Estate and Right to take the Profits of that, and that the Feoffer should take the Profits, is only an Equitable Construction in his Favour, which if he will pass away by limiting it to others, or in this or that Manner, he may; but when a Man, that has a legal Estate and an equitable Right too to take the Profits, will covenant to stand seized to an Use; he that will take the Benefit of the Use of the Land, must shew some good reasonable Cause to take the Profits in Equity, fince he hath none in Law; which no Man could do but he that comes to the Use for a good Confidera-

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sideration. When a Feoffment is made to an Use, a Trust is reposed in the Feoffee, which may be very well done, without any Confideration; nay, it better answers the End of a Trust, if it be done without any Confideration; and when a Trust is reposed in any Body, he must perform it, or he is Guilty of a Breach of Trust; but when he covenants to stand seized to a Use, the Cestur que Use ought to shew some good Reason to intitle himself to the Profits of Lands in Equity. And a Bargain and Sale, ex vi Termini, Holt, in implies a Consideration; and that there the Cafe of should be Quid pro quo. And as an More. Use cannot be raised upon a Covenant in a Bargain and Sale without Consideration; so if a Man for good and valuable Confiderations Bargains and Sells Lands, or covenants to stand feized to an Use, no Use is thereby raised; for the Words are too general to shew the Nature of the Consideration; and it appears not by them, whether any Consideration was given or not; and what is a good one to raise a Use ought to appear to the Court to be so; for they are to judge whether the Considerations given were fufficient, or not, to raife a Use; but yet, because, if in Truth, a Consideration was paid, Gc. it is reason-

reasonable the Party should have the Benefit of it, tho' prima facie, because there is none mentioned in the Deed, therefore there feems to be none; yet the Party may aver, that there was a Consideration paid, and set it out, which if it is an Use shall be raised to him; and this Averment is always traverse-Dyer able; and tho' there be a Confidera-146. 7 Co. 40. #1 Co. 24. tion which is always a good one, mention'd in the Deed, as suppose Money; yet may the Party aver another, besides that, if it stands with the Deed, as all Confiderations must that are averred to be of any Force or Effect; asi there be a Confideration of Blood averrd, the Party must be of the Blood of the I Co. 176. Covenantor. If A. covenants with B. for good Confiderations to stand feized

Covenantor. If A. covenants with B. for good Considerations to stand seized to his Use, no Use is raised to B. but if in Truth B. be of his Blood, and in Truth the Covenant was made for Advancement of his Blood, he may aver it, and so have the Use. When the Consideration is a Covenant to stand seized to Use, or in a Bargain and Sale, is good, and the Person certain, there that Person may take an Averment that the Consideration was paid, and according to

See Tit.
Revocation of
Uses, 34.

Uses, 34. the Truth of the Case; but where the Co. 176. Person is uncertain, and the Consideration general, there no Averment can be

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he taken by any Person. In the first Case the Averment by the particular person is but Reducing the general Confideration to fome Certainty, and making out that in particular, in Fayour of the Person who was before included in the general Words; which is very reasonable, in Case a good Consideration were bona fide paid by him; but in the latter Case the Intent of the Covenantor was void ab initio; for it appearing that he defigned no Body in particular, for the Benefit of the Use he would raise, no Person in certain could aver any particular Consideration why he should have the Use; because it plainly appears by the Deed he did not design him for the Use any more than any other Person; and the Law will not give a Use to any Body contrary to the Intent of the Party mentioned in the Settlement; therefore if A. for divers good Confiderations, covenants to stand seized to the Use of him that B. shall name, and nominates one, no Use is raised to him; for there is no particular Confideration expressed, and the Nominee of B. cannot aver any, because it appears that A. knew not who the Nominee would be, and therefore could have no Respect for any particular Person to make him raife

raise a Use. If B. had paid Money, Quare whether he might not have a verred it, and fo made good the Use to the Nominee; but if A. in Confideration of the Advancement of his Blood, had covenanted with B. to stand seized to the Use of such a one of his Kindred as B. should appoint, and then B. had nominated one, the Nominee had a good Use; for A. had a Defign, for very good Reasons, to advance some of his Family, and he only left it to B.'s Judgment who should be the Person. When Uses are raised to Sons in Confideration of Natural Love and Affection, and afterwards there is Proviso that the Covenantor, for divers good Confiderations, might make Leafes for any Number of Years or Lives, to any Person he would, he cannot by Force of this Proviso, make any Lease to any of his Sons, or any other Perfon; for the Consideration is too general to raise a Use; and no particular Averment can be made by any Perfon in certain, and the Consideration that is requisite in a Covenant or Bargain and Sale to raise a Use, will be fo in a Proviso to raise Uses in that Covenant or Bargain; for the Proviso is but an under Sort of Agreement, and what is requisite in the Covenant, which

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and hich is is the fundamental Agreement; for the Settlement of the Uses will be requisite in the Proviso of that Agreement; for it is an Agreement of the same Sort or Nature with the other; and the Ules raised by it are only raised by Covenant and Agreement, and not upon Feofiment, where Uses may be raised without any Confideration originally; and by the same Reason as it seems by Proviso. In the Case of Mildmay, he Use intended to be raised was deigned to come under that Clause in the Agreement, for divers other good Coniderations; and therefore for the Reaons aforefaid, it was void; but if the Lease to Oliffe had been for any other Confideration mentioned in the Propifo, it feems it would have been good upon these Words, other Considerations mentioned in the Proviso. It was reolved that the Confiderations, upon which a new Use must have been raied according to the Power of the Proo, must not have been any of those Confiderations mentioned before in the Deed; for the Word other implies. 6 much; and therefore for that Reaon also, the Use raised by the Power of the Proviso was void, being done for the Advancement of his Daughter, which was mentioned before, and was

Co.176

the Confideration for raising the Ule in the Indenture. If the Proviso had been that upon the Confideration of Blood he might have made Leafes to any of his Kindred, it feems the Intent had been good; for the Leafe might rife upon the Confideration, which was as good in that Case as in any Case of Blood; and the Persons to whom it was to be made were to be those expressed in the Consideration; but if it had been that for Confideration of Blood he might have made Leafes, it had been void, though the Leafe in facto were made to one of his Blood; for the Power was too general at first, and so void. 2 Roll 260. Cro. Jac. 180. like Case Moor 373. Hob. 312. 1 Co. 177. Moor 171.

Where there is a Recovery to the Intent to make such to bis own Use in the mean Time.

Moor 509. of Things lying in Grant.

Moor

103.

If a Feoffment be made, or a Fine be levied, or Recovery be fuffer'd, without Confideration, and no Uses are ex-Estates; be pressed, it is to the Use of the Feosfor is seized and his Heirs. But if any Uses be expressed, it shall be to those Uses, tho no Confideration be had; and herein is the Difference between raising Uses by Fine, Feoffment, or other Conveyance operating by Transmutation of Possesselsion and Uses raised by Covenant; for upon the first, if no Uses were expresfed, it is Equity that affigns the Feoffor to

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to have the Use; for by the Law, A Feoffthe Feoffor has parted with all his In-Consideterest; but where he expresses Uses, ration, tothere can be no Equity in giving him the Use of
the Use against his own Will; and there for Life,
can be no Presumption that the Conthey shall
veyance was to the Use of the Feoffor for Life.
against his own Declaration; but in Dyer 169.
Case of a Covenant, it is Equity that
have it but
the give a Use; for the Person can gued at
have no Right by Law; therefore in Court.
such Case there can be no Use with-Com. 306.
out a Consideration; for there is no
Equity there should.

Husband and Wife levy a Fine of the Show. Wife's Land to the Use of the Heirs of Parl. Ca. the Husband, begotten on his Wife, Re-2 Salk. mainder to the Heirs of the Husband, 675. this is a void Limitation; for the Husband, 4 Mod. band had no Use in presenti, and so

the other Uses cannot be supported.

A Trust is limited thus, If such a Parl. Ca. Marriage takes Effect, after M.'s Age of 16, being the Daughter of H. and she shall have Issue Male of the Body of S. then to both for Life, he marries her at 12 Years of Age, she lives 'till near 17, and dies without Issue, he shall have no Trust for Life; because she having no Issue Male, there was a Failure of the precedent Qualification to enable him, it seems she living 'till after Sixteen

Thid. 87.

teen fulfills the first Words well enough; Gc. if the Marriage should take Effect after her Age of 16, after the Death of S. and M. the Daughter of H. without Issue. The Trust was limited over to others; but decreed that 'till the Daughter of S.'s Death, he in Remainder could not take, but that the Heir should have the Trust till that happen'd; for so much of a Trust as is not dispos'd of, must be to the Heir. A Woman shall not have the Thirds of a Trust of a Term to wait upon an Inheritance against the Purchaser, by her Title of Dower, but against an Heir perhaps she may.

Ibid. 73. 1 Vent. 58. Dyer \$2. a. Parl. Ca. 104.

If Cestur que Use enters upon the Feoffee, he is Tenant at Will. See how Uses are executed by the Statute, 1 Leon. 298, all Pernancy of Profits is gone by the 27 H. 8. fo as now no Body can be Tenant to the Pracipe, in Respect of that.

2 Co. 15. Moor 195.

Tenant in Tail, Remainder in Fee, he in Remainder, in Consideration that the Land should continue in his Blood, and for divers other good Confiderations, covenants to stand seised to the Use of himself in Tail Male, then to the Use of his Brother in Tail Male, then to the Use of the King in Fee, no Use is hereby raised to the King, unless some valuable Consideration be averre

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to be given by the King; and if this Use in the King should preserve the Eflate from being barred, yet that could be no Reason to give the King an equitable Right to take the Profits; for that is no Advantage to him. If the Use had been limited to the King, in 2 Co. 15. Consideration that he was the Head of the Commonwealth, and had the Care and Government of his Subjects, yet had no Use been raised to him, for that is no particular Confideration to entitle him to the Profits of those Lands; neither has he any more Reafon to have them now than before; for Ex officio he takes Care of the Commonwealth, and to that End he has a sufficient Revenue.

Where the Lord Paget seiz'd of Lands in Fee, covenants with T. F. and others, in Consideration of the Charges of his Funeral Expences, Payment of Debts and Legacies, out of the Prosits of his Land, and for the Advance-1 Co. 154. ment of his Son, Brother, and others of and his Blood, that he and his Heirs would 165. stand seized of the said Manors to the Moor Use of the said J. F. for the Life of 195. the Lord Paget, and after his Death to the Use of C. D. for the Term of Twenty-four Years, and then to the Use of

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of W. P. his Son in Tail, with divers Remainders over; it was adjudged in this Case, that my Lord Paget had an Estate for his own Life; and the Reafon given is, because all the Remain. ders were to commence after his Death; and fo the Estate remained in him, during his own Life; but it feems that this must be understood, that all those Estates that were good, and upon a valuable Confideration, were to commence after his Death; for all Estates were limited to the Covenantees, du ring the Life of my Lord Paget; but it doth not appear to be on a valuable Confideration; it was also resolved that C. P. took not the Estate for Twenty-four Years, because there was no Consideration to raise it to him; for they had nothing to do to pay his Debts and Legacies, neither were they thereto chargeable; but if they had been his Executors, it had been good; for that had been their proper Work and Employment: It was also resolved that W. P. should take before the Twenty four Years expired, because the Words were after the End or Expiration of the faid Term of Twenty-four Years, which fignifies the legal Interest, and not the Time; and the faid Term being yoid, the Remainder Man's Interest com-

Moer 194. Quare. divers ged in had an e Reaemain-Death; n him, ns that 1 those n a vacom-Estates es. du t; but luable efolved ate for re was m; for s Debts thereto een his or that d Emd that wenty-Words tion of Years, A, and rm be-Interest

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commenced presently; for it was the Defign of the Party, that he should take after that Interest determined; and if there be no Interest, he ought to take it presently, or else the Deed would be construed most in the Grantor's Favour; but if the Words had been, and after the Twenty-four Years expired, then to the Use of W. P. in Tail, there, tho' the Term had been void, yet no Use had been raised to him, 'till after the Years expired; for by express Limitations, the Use was then to commence. In this Case, there was this Diversity taken by Manwood Chief Baron. Man covenants to stand seized to the We of one for Life, then to the Use of another in Fee, and the Tenant for Life refuses, the Remainder Man's Interest shall not commence presently; for it must be Equity that gives any Body a Right to take the Profits, during that Estate for Life, and the Remainder Man's Interest is not to commence 'till after his Death; fo that in the mean Time no Body being able to claim any Interest upon any good Consideration, the Use must remain in the Covenantor; but if a Feoffment in Fee be made to the Use of one for Life, then to the Use of another in Fee, and the particular Tenant refuses, the Re-Q 2 mainder

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presently; for the Feoffor had disposed

of the whole Land; and it is Equity

that gives him a Use when the Feof. ment is made without Confideration; but against his express Limitation, there can be no Equity in giving him a Ule: and the Feoffee paying no Consideration, there is no Reason that he should have any; and there being a Use limited to commence after the Estate for Life, which now is not, it is Reason. that it should commence. Quare of this Diversity, and whether, If the Feofiment was made in Fee, upon Consideration, the Feoffee should not have had the Use during the particular Estate. My Lord Hale said that a Trust being a Thing created by the Contract whether an of the Party, is wholly directed by the Party; confequently those that come bound by in the Post, are not liable to a Trust, Words; one because they are not within the Di rection of the Party, unless they are named, and then he feems to think they are bound, as thus: If an Estate is given to a Man and his Heirs, in Trust, those that do not come under 5 Co. 8. b. that Limitation are not charged with

Mcor 493, 515, a *Use* by the Party. 516, &c. A Man makes a Feoffment in Fee

i Co. 85, to the Use of such Person or Persons,

Hard. 469. Quere Assignee can be can be bound.

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and of fuch Estate and Estates, as he has or shall appoint by his Last Will and Testament, which was made before, and published again after the Feofiment. Quare whether the Estates be prefently executed according to the Limitation of those Deeds, or he be seiz'd of a qualified Fee. The Stat. 27 H.8. to executes the Possession to the Use. in the fame Manner, Plight and Quality as the Use, &c. but that must be understood where the Estate to the Use is large enough; for if Lands be given to A. and B. during their Lives, to the Dver Use of C. if A. and B. dies, C's Estate 188. a. is determined; for the Seisin to Use, Cro. Car. that A. and B. had, was only for their Hob. 84. Lives, and the Execution of it in C. Ch. Rep. cannot make the Estate larger.

Where Perfons shall be Jointenants for the Limitation of a Use to them, see Inst. 188. a.

If the Father and Son purchase Lands jointly, the Law will not suppose that the Son purchased only in Trust for the Father, and consequently shall survive to the Son. The Stat. 27 H. 8. executes the Possession presently, as to the Estate; so if a Man Bargains and Sells for Years, the Lessee is in Possession presently, and the Lessor has a Reversion,

fo as there are two divided Interests before any Entry by the Lessee, vet the Lessee cannot have Trespass he fore actual Entry; but by a Common Law Lease the Estate is not divided before the Entry of the Lessee; so fays Cooke, upon a Bargain and Sale the Freehold passes presently; but the actual Freehold is not in him till an Entry; for it is impossible an Act of Parliament should give any more than a Civil Seisin; it cannot give a natural one; but a Release may be made to one that has nothing but a Freehold in Law; fo it feems upon a Bargain and Sale for Years, the Party being in Possession of the Estate of the Lands for that Time, a Release to him will be good to increase his Estate; but in Case of a Common Law Lease, it feems a Release will not be good before the Entry of the Lessee; for the Estates are not devised till then, and fo there can be no Privity of Estate, and the Lessor can have no Demand upon the Lessee, which a Release supposes; but in Case of a Bargain and Sale there is a Privity, and the Demand of the Rent shall incur before actual Entry.

1 Inst. 266. b.

A. feized in Fee of three Acres of Land, makes a Leafe to A. of one Acre

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Acre for Life, to B. of another Acre for Life, and a Gift in Tail to C. of the other Acre, and covenants after all the Estates ended to stand seized to the Use of his Brother in Fee, B. dies, his Brother shall have that Acre in Fee presently, and shall not stay 'till the other Estates are ended; for if he should, perhaps that would never be; but if the last had been a Lease for Life, it had been all one, as it feems: for this Covenant should be expounded, Reddendo Singula Singulis. Where the Lord releases to a Copyholder in Fee, to have and to hold to him and 2 Roll his Heirs, to the Use of another, that A br. 7881 is a good Use; for the Release enures by Way of Enlargement of his Estate, and by this Release the Copyhold Eflate is extinct and gone, as it feems, to the Execution of a Use into Possession; by the Stat. it is requisite that there must be a compleat Possession; for the Feoffee must make an actual Entry; for the Intent of the Stat. was not to 5 Co. 112. help out a Possession already good; so b. it feems, if a Reversion be granted to one to the Use of another, that this is not executed before Attornment, for the Reversion passes not 'till then; but 2 Inst. 3103 if a Man hath a Reversion granted to 2 Vent. him by Fine, and before Attornment, 318.

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he Bargains and Sells it to another; the Reversion is executed by the Stat, in the Bargainee; for as in the first Case the Grantee had no Reversion for want of Attornment; and it consequently could not be executed; fo in the last Case,

832.

the Conusee had a Reversion before Attornment, which he passed the Use of to another, and then the Stat. executes the Possession to the Use, but in the same Plight as the *Use* was, and consequently still 'till Attornment, there wants a Privity of Distraining, &c. A. makes

1 Inst 309. a Lease for Years to B. and then grants the Reversion by Fine or Bargain and Sale to D. to the Use of C. this is executed by the Stat. in C. without Attornment; because a Reversion was granted and presently exccuted by the Stat. eodem instanti; fo that there could be no Time for the Tenant to Attorn to the Grantee; and if an Attornment was necessary, no Grant could be made by Fine to the Use, Gc. because no Attornment could possibly be had; but if the Grant were by Deed, then no Reversion could pass before the Attornment; and so not be executed by the Statute. nant for Life makes a Feoffment to 7. S. he in Remainder releases to him, the Uses are for ever gone; for

Pop. 78, 72.

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the Feoffee comes in of another Estate than what was subject to Uses; and the Release only removes the Right of the Remainder Man, but leaves the Feoffee in, of the same Estate he had before.

A. covenants with B. that if B. enfeoffs him of three Acres of Land in D. that then he the faid A. and his Heirs, and all others feized of fuch Lands, shall stand thereof seized to the Use of B. and his Heirs. A. enfeoffs another of the Land in D. now the Use shall rise to B. and his Heirs; for the Feoffment did not destroy the Contingency; for the Use was not to rise 'till after B.'s Feoffment, which it well may. There is this more in Cook's Settlement before-mention'd; had he made a Feoffment before he had granted the Reversion, the contingent Uses had been destroyed; for the Feoffee had not come in in Privity of Estate, which was subject to Uses; but of a new Estate this must be intended of a Feoffment made before the Contingency happens; for else the Estate had vested, and then it could not be destroyed; but the Grant of the Reversion being made first, and without any Consideration, the Grantee of the Reversion stood seized to Uses; and then when the

Feoffment was made, and the Estate discontinued; yet when the Tenant for Life in Remainder entered, he thereby recontinued all the Estates, and confequently the Reversion in the old Plight; fo that when the Contingency happened, the Use was executed out of the Estate of those in Reversion; and herein lay the Difference between conveying by Feoffment, and a Covenant to stand seized; for if he had made a Feoffment to those Uses, then the contingent Use must have arisen out of their Estate; and that Ad which the Tenant for Life could do. would amount to no more than to diffettle the Estates, and then when the particular Tenant had recontinu'd the Estates, the Feoffees had stood feized to the contingent Use, which would have been executed when it happened; but the Conveyance being by Covenant, and fo the Use to arise out of the Estate of the Covenantor, any Conveyance that hindered the Purchaser from standing seized to a Use, as where the Person comes not in Privity of Estate, destroyed the Re-J. S. feized of Copyhold mainders. Land held of Sir T. B. by Indenture, 13 Co. 55. dated 22 Dec. between him on the one Part, and the faid J. S. and G.S. his Son, on the other Part, did Bargain

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and Sell, Enfeoff and Confirm unto the faid J. S. the faid Lands, to have and to hold to the said J. S. and G. S. their Heirs and Assigns, to the only Use and Behoof of the faid J. S. and G. S. their Heirs and Assigns for ever, and Livery of Seisin was made according to the true Intent of the Indenture. In this Cafe, these Points were remarkable. First, That G. S. being not named, but in the Habendum, could not take by the Habendum; for the Livery did not help him, being made according to the Intent of the Indenture, which Indenture was void to him, and now could have no Intendment in Law to give him any legal Estate, and consequently the Livery would not give him any thing, being only pursuant to the Indenture; but tho' the legal Estate limited to him were void, yet the Use limited to him was good; for that is construed according to the Intent of the Parties, and may as well come after the Ha-And then it was bendum as before. further resolved that they were Jointenants, because the Use was jointly limited to both; and the Statute executes the Possession according to the Use, and F. S. was not in here by the Feofiment, as he should have been, had the Uje been limited to him alone, because it appears to be the Intent of the

the Feoffor, that they should have one Joint Use; and so the Limitation of the Use to him removes the Estate he had before fettled in him; as if one makes a Feoffment in Fee to the Ule of the Feoffee, and the Heirs of his Body, this divests the Common Lan Estate, according to the Intent of the Parties expressed by the Limitation of the Ules; and tho' this must be own'd to be out of the Words of the 27 H.8. yet it is within the Meaning of the Act, and shall be executed by it. Words of the Act are when any Person, &c. stand or be seized to the Use of any other Person, &c. and here the Person is feized to the Use of himself; and so of the like Cases, a Use shall not be fuspended or extinct by a joint or sole Seisin of the Land; as if A. had at Common Law been enfeoffed to the Use of himself and B. the Use had been a Joint Use to him and to B. tho' A. were fole feized of the Land, for no Part of the Use had been sufpended and extinct; and therefore it seems the Use shall survive in such Cafe. The like Law must be of a Trust now. So if A. and B. be enfeoffed to the Use of A. and his Heirs, and A. dies, the whole Use shall descend to his Heir, but B. shall remain the

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the fole Tenant of the Land, for this feemed the Intent of the Parties by the Limitation of the Use.

A. with feven others was feized to 1 Leon. the Use of himself and his Heirs; the 257. Use was held suspended for an Eighth Part. A. covenants with B. that when A. shall be enfeoffed by B. of three Acres of Land, that then A. and his Heirs will stand seized of the Land in S. to the Use of B. and his Heirs, and afterwards A. enfeoffs a Stranger of his Lands in S. and B. enfeoffs A. of the three Acres; it is faid to be refolved in this Cafe, that the Use will arise to B. of the Lands in S. tho' the Stranger had not Notice of the Ule; but it feems this must be underfood that the Feoffment was made without Confideration; and Quare then, for if it were made with Consideration. then there is no more Reason the Land should be charged with the Use, into whose Hands soever it came, by Rea-1 Co. 50. fon of the Covenant, than there is by 4 Co. 22. Reason of an Use actually raised; for a ". Covenant, cannot extend beyond the Abr. 780. thing itself.—Uses were governed at 2 Inft. 23. Common Law by the same Rules as a. Co. 56. the legal Estate itself was; so if it Dyer 179. were entailed, it was descendable in b. like Manner as a legal Estate intailed; Bro. 338.

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fo there was possession fratris of a Use; and if the Lands were Gavelkind Lands the Use descended to all the Sons alike; so if by Custom the Land was descendable only to the eldest Daughter, the Use would descend so too.

So if a Man feized of Lands of the Part of the Mother, makes a Feoff-Moor ment in Fee without Consideration, 1 10,87, the Use shall be to him and the Heirs 100 b Dy r 169. of the Part of the Mother; and in B 837: this all agree; but if he referves a U/e 4. And to him and his Heirs, then Hobart fays, 35 held the Use shall go to the Heirs of the so even fince the Part of the Father; but the better Stat. 1 Inft. 9. Opinion feems to the contrary. - An 6. Estate raised by Use may be waived Moor in pais, as upon a Feoffment to the Use 519. of Cestuy que Use it may be waived in Dyer 169. econt. pais at the Common Law. Before 27 Cro. El. H. 8. if a Man had Bargained and Sold 478. 6 Co 34. Land for valuable Confideration, a U/e Us would in Fee had passed without the Word cease with Heirs; for Equity having the sole out Claim, Management and Disposal of these Afat Com-mon Law, fairs, they had not regard to the strict but not so Rules of Law, but to the Intent of 6 Co. 34 the Parties; but now the Stat. transferring Uses into Possession, whereby 1 Co.123 they become Common Law Estates; as 4 Co. 16. there is the same Reason for requiring Words

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make becau Words of Limitation in fuch Cases, as where Lands pass by Common Law Conveyance, so in Fact it is, and consequently the Intent of the Parties must be legally expressed, or else no Estate will pass.

A Woman was not Dowable of an Estate in an Use; neither could a Man be Tenant by the Curtefy of a Use; and so most Estates being in Use, it was usual for the Friends of the Woman, either before or after Marriage to get some legal Estate settled upon her for her Jointure, which was the first Occasion and Original of Jointures. By the Common Law a Use was alienable by Cestuy que Use, or he might have a Bill in Chancery to compel; the Cestury que Use could not enter upon the Lands and make a Feoffment of them; but if he did he was Diffeisor; but if the Feoffees had re-entered upon the Feoffee of Cestur que Use, they should stand seized to his Use, it seems by the Stat. of R. 3. no Body can make a Plow. Feoffment of the Land in Possession, 350, 351, but he that has the present Use in Post 352. fession; so if there be Feoffees to the b. Use of A. for Life, then to the Use of Bro. 339. B. in Fee; tho' by the Stat. A. may Dyer 330. make a Feoffment in Fee of the Land, because during his Life the whole E-

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state is to his Use, and after the Death of A. the Feoffees may enter and revive the Use to B. yet B. cannot, during the Life of A. make a Feoffment of the Lands, because the whole Estate is to the Use of A. and B. has no Right to a Possession, and the Feossess cannot enter to gain a particular Estate; for that would be without any Donor. But if there be Tenant for Life to the Use of A. and then the Reversion is granted for Life to the Use of B. and then the Reversion in Fee to the Use of C. here being several Estates, B. may grant the Reversion that is to his Use, and fo may C. for none of the Inconveniencies follow from hence that there do in other Cases where the Estate is but one; but if there be one Estate to the Use of A. for Life and to the Use of B. in Fee, tho' B. can make a Feoffment, and thereby pass the Possession, yet it feems he may make a Leafe or Grant of a Rent to commence after the Death of A. He that has a Use in Ese, has Power by 1 R. 3. to make a Feoffment, but not he that has a Use in Right only, but fuch Person may do an Act that extinguishes his Right, as by releasing, &c. The Intent of the Stat. was to give Remedy to transfer an Estate, not revest it; so that if one

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be seized of Lands in Fee, to the Use of A. in Tail, Remainder to B. in Fee, A. by Force of the Statute makes a Feoffment in Fee, and dies without Issue, R. has no Power to gain this Use; but by the Entry of the Feoffees, and 'till then he has no Power by 1 R. 3. to do any thing with the Land; but if the Feoffee to an Use be disseized, and Cestuy que Use releases to the Disseizor, this extinguishes the Use, and by the Statute bars the Entry of the Diffeifee. Where Feoffees to an Use are disseifed, and afterwards the Diffeisor enfeoffs Cestuy que Use, who enfeoss a Stranger, by this the Use and Possession both pass. and the Feoffees cannot enter to revive the Use, it seems, tho' a Use were de- Bro. 3376 visable at Common Law, yet no Power b. 8. is given by 1 R. 3. for the Cestuy que 27 H. 8. Use to devise the Land; for the Intent of the Statute was not to make Land devisable, but only to give Power to the Cestuy que Use to alien, during his Life, by an Act executed. If the Lord Dyer of a Seigniory, or the Grantee of a 143. A. Rent-Charge, be also Cestuy que Use a. of the Land; and by Virtue of 1 R.3. makes a Feoffment in Fee, by this the Seigniory and Rent are both destroy'd; but if they both had made the Feoffment as Attornies, the Rent remained.

If Ceftuy que Use made a Feoffment in I Inft. 202. 4. Fee upon Condition, and entered for the Condition broken, he shall be fer zed of the legal Estate of the Land. Bro. 337. If Cestary que Use in Tail makes a Foof ment in Fee, this only is during the 19 H. S. 13. Life of Ceftuy que Ufe; for he had no longer Power over it; but if he aliens by Fine, that it feems is good to bind the Islue, if the Alienation were fince Bro. 337. the Stat. of H.7. but it feems a Recovery had against him, does not bind the Issue, because he is not Tenant to

the Issue, because he is not Tenant to the Precipe, and there can be no Recovery in Value by him, to recompense the Issue.

If a Man recovers by erroneous Judgment, and makes a Feofment to his own Use, and upon Error, the Judgment is reversed, the Party may enter Bro. 339. without a Scire facias against the Pr- 338, Feoffees; for it is plainly within the Letter of the Statute; if Cestuy que Use makes a Lease for Years by Deed indented, referving Rent, he may have an Action of Debt upon the Contract, for the Leffee is estopped; but he cannot avow Taking the Distress, because he has not the Reversion. If the Reservation of the Rent be not by Deed indented, it is not good, because he has not the Reversion.

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Quere, Whether Cestuy que Use may make a Feofinent by Letter of Attorney. If Ceftuy que Use makes a Lcase, ch. Rep. the Reversioner shall punish the Waste 49, 68. done, and enter for the Forfeiture; if he recovers the Rent it shall go to his Heirs: If a Condition be added to the Non-payment of Rent, he must enter; but Quare whether he shall retain it against the Feoffees. Ceftuy que Use could not distrain the Beasts Damagefeafant, before the Statute but fince ha may: A Trust may be entailed, as it feems, and then the Fine of Gestuy que Use will bar it; and there feems the same Reason for a Common Recovery.

A Trust in Fee is not forfeitable for Hard. Felony; for no Statute made Ufes for- 495. feitable in fuch Case; but it seems by my Lord Hale, that it is by Force of 26 H. 8. 20. the last of which mentioned Uses, which Statute being made after 27 H. 8. must mean Trusts, as now Uses are made liable to be executed by the Stat. of H: 7. yet 29 Ear. 23. was made to make Frusts liable to pay Debts; for according to Hale, before that Statute they were not Assets to pay Debts. A Trust in an Alien is forfeited to the King, in the Case of the King's Debtor, Trusts were liable per Curfum Scaccarii. If Gestuy que Ufe willed R 2 that

244 Uses and Trusts.

Tail to J. S. and died, the Use was changed before the Execution of the Dyer 96. Estate.

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If Husband and Wife be seized of Moor 197-Lands in Right of the Wife, and they 2 Co. 57. make a Feoffment, and declare the r And. Uses, that shall not bind the Feme: 164. for the Feoffment does not bind her. It is but an Act in pais, and she being sub potestate viri, it may be made contrary to her Will; but if they levy Owen 6. If the Fine a Fine of the Wife's Land, and debe of the

Husband's for the Wife may levy a Fine, because which the she is privately examined before a Feme has Judge; and if she may levy a Fine Dower, her with her Husband, she may declare Difassent the Uses; for that is but pursuant to the Husband's De- the End and Intent of the Fine; and

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of such a Fine, that is good, and it shall bind the *Feme*, if her Disassent does not appear; for the Will of the *Feme* being in the Disposal of her Huster

and they two being considered in Law but as one Person, the Declaration made by him is considered as the Declaration

band, he being reputed as the Head,

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Seized of and they lare the Feme; bind her. he being he made ney levy and dene Feme;

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of both, when nothing appears to the contrary, and consequently, though the Estate of the Land moves from the Wife, yet if the alone declares the Uses of a Fine levied of her own Land, fuch Declaration is null and void; for it is made by one that has by Law no disposing Power, even of her own Estate, but has her Will subjected to the Husband's Will, and so is not fui 7uris; but yet on the other hand, if the Husband make one Declaration of Uses, and the Wife another, both Declarations are void; the Wife's is so upon the Reafon before mentioned; and the Hufband's is so because the Estate being the Wife's, and so not in the Disposal of the Husband, without the Concurrence of the Wife; after the Fine levied, he might make what Declarations he pleased of the Uses; he might dispose of the Estate as he pleased, in Spite of his Wife; and fo all the Care the Law takes for the fecret Examination of Feme Coverts, in the levying a Fine, would be vain and fruitless, and the Declaration of the Uses is but pursuant to the Design of levying the Fine; and so she ought to consent to that as well as the other; and so though an Infant can do no Act to oblige himself, yet if he levies a Fine, he is enabled

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by Law to declare the Uses; and if he reverseth not the Fine, during his Non age, the Declaration of Uses will stand good for ever; for the that be a Matter in pair, and all such Acis an his fant may avoid at any Time after his full Age, if he do not consent; yet being made in Pursuance of the severing a Fine, which Fine must stand good for ever, so will the Declaration of Uses too.

12 Co. 123. 2 And: So if one Non tompos levies a Fine, it is unavoidable; but yet he may, by Deed, declare the Uses of that Fine, which Declaration of Uses will also

stand good for ever.

If the Husband and Wife agree in the Declaration of Uses of Part of the Lands, and difagree for the Relidue, the Declaration of Uses for that Pan they agree in shall stand good, and be void for the rest; for as to that Part in which they both agree, all the Requifites are found necessary to make Declaration, and the Defect of the other Part can have no Influence on that which is good; but if they agree in the Limitation of Uses for Part of the Estate in the Land, and disagree in the other Estates, there all is void; for 'else there will be another Moulding of the Estates than the Peme designs, and

nd if he ris Non ill stand a Matan Inafter his nt; yet tevying rood for of Ules a Fine, nay, by at Fine, rill alfo gree in t of the Residue, nat Part and be Part in he Remakea of the ence on

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her Consent is requisite to every Estate that shall be created by the Limitation of Uses; and it is to be ordered by her Direction. Thus if the Husband declares the Uses to himself and Wife for Life, the Remainder to the Heirs of the Wife, and the Wife declares the Uses to herself for Life, and then to her own Right Heirs, both Declarations are void, and it shall not stand good for the Remainder in Fee, and be void for the rest; for the Estate moving from the Wife, whatever Uses do take Effect must be by her Direction and Confent, and in the same Manner as she pleases; tho' the Husband has Power over the Estate of the Wife, during Coverture, yet if the declares the Use one Way, and he another, his Declaration is absolutely void, and it shall not stand good, during the Cover-The Reason of the Difference feems, that in other Cases the Husband having Power over the Wife's Estate, he may grant an Interest as from himself, during the Coverture, for fo long as he has Power over her Estate; but when they levy a Fine in Fee, the Estate passes solely and entirely as one Estate in Fee-simple from the Wife; and the Uses that are declared thereupon must be all with the Confent R 4

Confent of the Wife for the whole E. state, because the whole Estate and Interest passes from the Wife; but if a Iointenant levies a Fine, and one declares the Use one Way, and another another Way, here both the Declarations shall stand, viz. the Declaration of each shall stand for his Moiety in Respect of their feveral Interests. If Baron and Feme levy a Fine, and an Indenture in both their Names, is brought to the Wife to feal, declaring the Uses of the Fine, and the Wife refuses to seal, this Declaration shall not bind her, because, tho' a Declaration of the Husband be fufficient, yet here her Refusing to feal was a sufficient Declaration of her Difaffent. When Baron and Feme fell the 2 Co. 57. Land to one, and after levy a Fine to

2 Roll Abr. 798.

2 R. 798.

him, this shall bind the Feme; yet here is no Declaration of Uses; but it is prefumed to be to the Use of the Conusee, and his Heirs, and consequently is binding. If a Fine, levied by Baron and Feme, be reverfed by Reason of the Nonage of the Wife, the whole Estate shall be revested presently in the Feme; and there shall not be any Difposition during the Coverture.

Dyer 290. 4. Baron and Feme seized of Lands, Note, The Wife join'd and Baron covenants by Indenture, in covery, &c. Consideration of 201. to suffer a Re-

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covery of Lands to the Use of the Recoverors, till they have made a good and indefeasable Lease for forty Years, and then to the Use of the Husband and Wife, and the Heirs of the Husband, band; it was held that this Declaration should bind the Wife, the Husband alone making it.

Where Baron and Feme levy a Fine of the Wife's Land, and both by Indenture, in Confideration of a Sum of Money, limit the Use to the Conusee, with a Condition and Clause of Reentry, upon Payment of fuch Sum which was allowing 10 per Cent. which, with the taking the Profits together, made it an Usurious Contract; but before the Fine engrossed, there was 2 Roll another Deed, wherein it was cove- Abr. 798. nanted that the Conusor should take the Profits till Default of Payment; at the Day appointed, the Feme disagrees to the Deed; yet it was held she was bound; for the first Deed was Declaratory to the Uses to which she agreed, and the last Deed was but Explanatory of the first; the last Contract was about the Money which the Feme had nothing to do with, but was the Hufband's.

If A. be Tenant for Life, Remain- Ibid. der to B. in Fee, and they levy a Fine, <sup>2</sup> Leo. 58. this

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this shall be to the Use of A. for Life, and then to the Use of B. in Fee; so if the Owner of the Land, and a Stranger levy a Fine, it shall be to the Use

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If an Infant Bargains and Sells Lands and then levies a Fine to the Bargainee, though the Bargain and Sale be made. yet it shall amount to and stand as a Declaration of Uses upon the Fine; so if by Custom an Infant of the Age of Fifteen may make a Feoffment, and he accordingly makes one to the Ufe of his Last Will, tho' he cannot by Law make a Will, yet he may declare the

Ules upon the Feofment.

Husband makes a Feoffment of the Wife's Land to A, and he and his Wife levy a Fine to A. this shall be to the Ule of A.

Mhat Confiderations are lufficient to raise a Ase.

7 Co. 4. 2 Roll 785. Plow. 307.

Brotherly Love and Affection is a good Confideration to raise a Use, according to the Case of Bedel; and the Continuance of the Land in the Name, Gc. is a good one; fo that all the Confiderations in this Case are good to raise a Use, tho' taken singly and apart. If a Man covenants, in Consideration of Natural

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Natural Love and Affection to his Brother to fland seized to the Use of him and his Wife; it feems that is good to raise a We to his Wife, they being both but one Person; so that the Love and Favour he bears to his Brother may he very well faid to extend to his Brother's Wife; and accordingly in the Case of Bould and Wynston, it is adjudged that where the Father covenants, in Confideration of Natural Love and Affection to his eldest Son, to stand feized to the Use of him for Life, and Cro. Jac. then to the Use of such a Ferne as he Roll should marry for Life, that was a good 76, 4. Consideration to raise a Use to the Plow. Wife, as well as if a Man covenants, in Consideration of the Marriage of his Son with fuch a Feme, to stand seized to the Use of the Son, and the Son's Wife; this is a good Confideration to raife a Use to them both; the a Consi- 7 Co. 40. deration be absolutely requisite to the 183. raising a Use upon a Covenant, yet no Consideration needs be mentioned in the Deed; but if the Person be such an one as has an obvious Confideration of his Side, a Use shall presently rife to him; as if a Man covenants to stand feized to the Use of his Wife or Brother, or any of his Kindred, this is sufficient to raise a Use to them, without any Mention

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11 Co. 24 Mention of a particular express Const T. Jones, deration; for the Love and Affection be-Cro. Car. tween them is obvious; which being a 230. Consideration in it self sufficient to raise Moor 495, 564. a Use, it shall be presumed that it was to the Intent the Use was limited; nay, if there be a Confideration to some certain Person, and afterwards a Use is limited to another Person, that does

not come under the Consideration expressed; yet if he be a Person on whose Side there is a manifest Presumption of

another Consideration, he shall have If a Use the Use limited to him by that Const be limited to a Woderation, tho' he could not take by Virman before tue of the first. Thus if a Man co-Marriage, venants, in Consideration of Natural «without Considera-Love and Affection that he bears to his tion, it eldest Son, to stand seized to the Use of will not him, and then to the Uje of any other vaile an Use, unless of his Kindred, as Brother, Cousin, Go. it be parthis shall give a Use to them, tho' they ti ularly averred do not come within the Confideration for some that is expressed to the eldest Son; for Considerathere is an obvious and apparent Contion; for before sideration to raise a Use to them; and Marriage

there is no it seems by the same Reason, if any other Consideration were had for raising Presumption on ber the first Use, it were the same thing; Side.

but if a Consideration be expressed for the raising a Use to a Person, that would

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out any express one, yet if that express one fails, no Use shall be raised by Force of the implied one, for expression facit cessare tacitum. Thus if a Father, in Consideration of 100%. covenants to Co. 24 stand seized to the Use of his Son, this must be enrolled, or else no Use passes; vet if no Money was paid, a Use would rife to the Son by the implied Consideration, without any Enrolment. So if a Man, in Consideration of the Natural Love and Affection he bears to his Children, covenants to stand feized to the Use of himself for Life, then to the Use of his Wife for Life, Gc. this will raise a Use to the Wife; for tho' fhe does not come within the Consderation, yet there is a manifest Consideration of her Side; and confequently Plow. shall a Use very well arise to her.

The Confideration of ancient Ac- 2 Roll quaintance, or being Chamber-Fellows 783together, or entire Friends, will not raife a Ule.

If A. in Consideration of B.'s being bound in a Recognizance for him, Bargains and Sells the Land to him, no Use will arise to him, because it is not a Bargain and Sale; there is not quid pro quo; but yet it is agreed that fuch a Con- cro. El. inderation is sufficient to raise a Use upon 394 a Covenant; but the Words were not 783.

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If a Man, in Confideration of Low

apt to make a Covenant to stand feird and so the Deed had not any Opera, tion.

Quære, Whathen Loan of Money be a good Consideration to raife a Use, or make a Bargain and Sale. 2 Roll 782, 790.

and Affection to his Wife and Children. and to the Intent to fettle his Lands in his Name and Blood, covenants with his Brother and Strangers, to Rand feiz'd to the Use of himself for Life, then to the Use of his Wife for Life, and then to the Use of the Covenantees, and their Heirs; it was held that no Uli arole to Strangers, because they could not come within the Confideration: Cro. Car. yet it did arise to the Brother, both from the Consideration expressed of let tling the Land in the Name and Blood of oc. and also because he was his Brother, yet there was a Trust limited

529. 2 Roll 783, 791.

after the Life to him.

2 Roll 784. 2 Inft. 672. Plow.307.

If a Man in Consideration of Money given by A. covenants to fland feizi to the Use of A. and B. and C. or to A. for Life, Remainder to B. for Life, Remainder to C. in Fee, this is good, and shall raise Uses to them all; for the the Money be given but by one, vet it is a Confideration for all the E flates, and shall be prefumed to be gi wen for all; but Natural Love, Gc. is a personal Consideration, applicable to no Stranger; and fo no Ufe can arife

Body by There i far as to Money ly the C by Deed to their C. that them, a as paid deration with fuc feized to this is w ger; bi Plowd. mited if Estate 1 that in because good, a after the Use to the Use: Quere v tion be may as and Ro

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by Force of the Confideration to any Body but to those that come under it. There is a Cafe in Roll's that goes so far as to fay, that if a Confideration of Money be given by A. and consequent- Yelv. 51. ly the Owner of the Land covenants son. by Deed with B. and C. to stand feiz'd to their Use, viz. to the Use of B. and C. that by this a good We is raised to Plow. them, and the Money is look'd upon Moor as paid for them. If a Man, in Confi- 505. deration of the Marriage of his Son Considerawith fuch a Woman, covenants to standil. S. will seized to an Use, the Remainder to Covenantor this is void to C. because he is a Stran-bave a ger; but yet it is faid by Counsel, in particular Ploud. that if the Estate to C. be li-but Quere mited first, and afterwards there is an Whether is Estate limited to the Son and his Wife, be by Conthat in fuch Case the Use to C. is good, or to supbecause the Use limited afterwards is port any good, and that is not to commence 'till other Usa after the Estate of C. ended; and so the 784. Use to C. shall be held good to support the Uses to the others that follow; but Quere well of that, for if the Limitation be void, it feems the other Uses may as well be supported without it; and Roll that has took almost every Thing that is remarkable out of that Case, yet has left this out.

2 Roll If a Man, in Confideration of Na. 785, 794 tural Love, &c. to J. S. taken and reputed as his Son, covenants to stand seiz'd to his Use, by this no Use is raised to a Bastard Son.

If a Man for divers good Causes and Considerations, covenants, &c. no Use arises, the Consideration is too general, and the Certainty ought to appear, for the Court to judge whether the Consideration

But if a Man Bargains and Sells Lands

deration be fufficient or not.

for a certain Sum of Money, that is fufficient to raise a Use, without mentioning any Sum of Money in certain; Ibid. 785. for whatever the Sum be, it is sufficient to raise a Use; and so there needs no Averment of any Sum in certain, for

the Court to determine.

A Man covenants, in Consideration of Money, to stand seized of the Lands to the Use of A. and his Heirs, and being seized of other Lands, covenants that if he should afterwards sell them, A. should have the Refusal; and if he went about to sell them to any Body, without making him the Offer, that from thenceforth he would be seized to the Use of him and his Heirs, he afterwards goes about to make a Sale of them, without offering him the Lands; it was held that the Use arose to him;

2 Roll 785.

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A Filees, w Years, a for the Money paid for the other Lands was also a Consideration for the Covenant. It seems at Common Law, the Party had two Remedies to come to the Effect of his Covenant, either to sue in Chancery, and have a specifick Performance of the Covenant, or else to have an Action.

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If a Man covenants now to stand Plow. seized to a Use, and there is no Con- 308. it seems sideration, so that there can be no Use not. raised by Law. Quare whether or no Dyer 96. the Party may have an Action of Covenant, and recover Damages. Where the Party shall convey by Way of Use, and not by Common Law Conveyance.

A Man covenants, that in Conside-Dyer 96. ration A. had conveyed divers Lands to him, after the Death of A. to levy a Fine of his Lands to the Use of himfelf for Life, and then to A. in Tail, the Fine is not levied, no Use shall rife by Force of that Covenant; for the Intent was not that it should rife presently.

To what Ales a Conveyance thall be faid to be had.

A Fine is levied to several Conu- Moot sees, with a Render to one for thirty 478.

Years, and several void Remainders, the Fine

Fine shall be to the Use of the Conv. fees; for otherwise the Render cannot be good; for if it be to the Use of the Conufor, the whole Estate will be in him, as before, and the Render naught; but if the Render had been void in all, then the Use should be according to the Intent of the Render. Quare, Why it may not as well be to that Use, where but Part of the Render is void.

#### Consideration.

If a Man covenants, in Confideration Abr. 790. of Natural Affection to his Son, to stand seized to his Use, tho' there be no other Confideration mentioned, nor no general Words, as for divers other good Causes and Considerations, it may be averred that it was in Confideration of Payment of Debts of the Father by the Grand-father; and also of Lands fettled by the Grand-father upon the Father: for these Considerations are not contrary to the Deed, but may well concur.

If a Man covenants in Confideration of a Marriage to be had between him and B. to stand seized to the Use of himself and B. for Life, no Use rifes till the Marriage; and if they should marry

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marry, and be divorced Causa pracontract, it seems the Use to B. would rease.

A Man covenants, in Consideration of the Marriage of his Nephew, and of two hundred Marks paid by the Father of the Woman he is to marry, to stand seized, &c. the Marriage takes no Effect; it was held by the Judges that a Use would not rise upon the Money. A Man covenants that two Persons Moor shall quietly enjoy his Land; no Use 102. 1 Sid. 16 arises.

#### Limitation of Ales upon Conveyances.

Tho' the Appointment and Limita- 3 Co. 26 tion of Uses, by an Indenture in Writing, precedent to a Fine or Recovery. do not bind the Estate of the Land, yet being made in so solemn a Man- 2 Roll ner, it is not to be controuled, but by 291. Matter of as high a Nature; and fo if the Uses of a Fine or Recovery to be had, be declared by a Deed precedent, no Averment by Parol will alter the Declaration in Writing, according to the Maxim, unumquodque dissolvitur eo li- Holt, gamine quo ligatum est, because an A- Jones, c. greement by Deed, for the Direction of Uses is not obligatory as to the Estate of \$ 2

of the Land, but only a bare Contract between the Parties, and consequently by Deed it may be disannulled; as all Contracts, by Confent of the Parties, may lose their obligatory Power; so if the Party declares other Uses by Deed, before the levying the Fine, the last Declaration shall stand, as the last Declaration of the Mind of the Party. If there be any Variance between the Agreements Declaratory of the Uses of the Fine, and the Fine itself, as in the Number of Acres, Time, Perfons, or the like, there a Declaration of Uses by 2 Co. 75 Parol, shall stand good, the posterior to a former Declaration by Deed; for when there is a Variance between the Agreement and the Fine levied, then it cannot be prefumed to be the Fine intended by the Agreement, because different from it, and then it shall be guided by the parol Declaration, which may well direct the Uses of it, be

cause being different from the Deed of

Agreement, there is no need to guide

the Uses of the Fine; but if there be

no parol Declaration of Uses, the Fine should be guided by the Declaration Ibid. 76.a. of Uses contained in the Deed, not withstanding some Variance there may be between the Deed and the Fine; for when no other Fine is levied, or no other

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other Declaration of Uses made, there the Fine shall be that presumed to be mentioned in the Agreement. Where there are two several Declarations of Uses, by Deed precedent to the Fine, there the last shall stand in toto, for it is wholly a Revocation of the former; and so the Fine shall not be to the Uses of both Deeds compounded and thrown into one another.

It came to be a Quare in Dowman's 9 Co. 9. Cafe, Whether a fubsequent Declaration of the Uses of the Recovery were good to raise Uses upon the precedent Recovery; for the Intent of the Uses, as was agreed, must either be precedent or present with the Recovery; but it was adjudged to be good; for when there is no other Declaration of Uses, then the subsequent one is supposed to be the Intent of the Party at the Time of the Recovery suffered; for so the Parties themselves have declared it to Not by be; but where the Declaration of Uses for and bis by Indenture precedent and subsequent Heirs, but differ, that against precedent Declara-where a rations no parol Averment is to be ad-cedent and mitted; but against a subsequent De-Fine differ, the Conuclaration by Deed, there may be a pa-for may rol Averment; for if before, or at the aver. Time of the Recovery fuffered, there Holt in ones v. was fuch a particular Declaration of Morley.

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Ules by Parol, then the Estate was prefently executed to those Uses; and then any Manner of Declaration by Deed comes too late; if in the mean Time between the Recovery and the Deed fubsequent Declaratory of the Uses, there be any Lease, &c. made of the Lands, then the subsequent Declaration is not fufficient of itself to shew that the Intent of the Parties was that the Recovery should be suffer'd to those very Uses declared by the Deed subsequent, and thereby to avoid all mean Estates and Charges; but there must be some other very good Proof that fuch was the Intent at the Time of the Recovery had. Where a Recovery is fuffered without Consideration, it is to the Use of the Recoveree, who confequently may declare the Uses of it by Deed fubsequent, when it is suffered with Confideration; and fo the Estates shall be executed. Quare, Whether the Recoveree can declare the Uses by any subfequent Deed; tho' he feems to stand in the same Place with the Recoveror, where it is without Confideration. If any Clause, Privilege or Consideration be added to a Use declared by Parol, yet the Declaration of the Use shall stand good, though the Clause, Ga be void. An Indenture for Years, after the

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### Pleading of Ales.

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The Form of pleading Uses is to fay 9 Co. 11. that a Recovery was had to fuch and fuch Ules; and in an Affize, by the Lord Cromwell against Andrews, of Lands and Tenements in Alexton, Indentures were giving in Evidence; whereupon the Jury 2 Co. 69. find a special Verdict, viz. that J.B. was Mo. 105, feized of the Manor of A. in Fee, and 2 And. of the Advowson of the Church of A. 89. thereto belonging; and by Deed Bargained and Sold the Manor, with the Appurtenances, to A. A. to have and to hold to him and his Heirs, to the Use of him and his Heirs, in the same Manner and Form as is aforefaid in the Indentures mentioned; and by the same Indenture, J. B. covenanted to fusfer W. R. or R. A. to recover the faid Manor, with the Appurtenances, by a Common Recovery to the Uses following, to the Use of A. A. and his Heirs, rendering forty-two Pounds to B. and his Heirs, at two Feasts, with a Clause of Distress, and Nomine pana; and it was further covenanted that Blunt, before Easter next, should levy a Fine of the faid Manor to A. S. 4 A. and

A. and his Heirs; and by the same Fine A. A. should render forty-two Pounds per Ann. to the faid 7. B. and his Heirs. Provided always that the faid A. A. shall by his Deed fusicient in the Law, give the Advowson and Parsonage of the said Church to the faid 7. B. during his Life; and if it happens not to be vacant in his Life, then one Turn to his Executors; and it was further agreed, that all Manner of Estates, Assurances and Conveyances hereafter to be made, should be to the Uses and Intents comprized in the Indenture, and to no other Intent or Use, and accordingly a Recovery was had against J. B. and then J. B. and A. A. levied a Fine to R. R. and his Heirs, who granted and rendered the Rent of forty-two Pounds to J. B. and the Heirs of his Body, the Remainder to my Lord Mountjoy, in Fee, and the Land he rendered to 7. B. and his Heirs, and the Jury find that this Fine was levied to the Use in the Indenture mentioned, A. A. died before he made any Grant of the Advowson, according to the Proviso. 7. B. having never requested it, the Church became vacant in the Life of J.B. E. A. enters upon the Manor as Heir to A. A. and 7. B. enters for the Condition

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fame Condition broken, and Bargains and Sells the Manner to the Lord Cromwell, on -two whom A. A. enters; Lord Cromwell . and dies, and his Heirs enter, upon whom t the E. A. and the rest, by his Command, cient re-enter, and whether it was a Disseisin, and was referred to the Court; and first, it the if it was refolved, that though the first Deed Life, of Bargain and Sale passed no Estate, not being enrolled, but ferved only as ind it a Declaration of Uses, yet the Word anner Proviso made a Condition; and so all eyanthe Uses afterwards raised and execube to ted by the Recovery were Condition the nt or nal; for as there may be a Deed precedent to raise the Uses of the Recowas . and very; fo there may be a Confideration added to those Uses which will make d his the the Estate Conditional, when it is after-7. B. wards executed; and the Condition need Re not be made at the fame Time the Fee, Estate is made; for making a Condi-7. B. tional Use makes afterwards a Conditional Estate, the Statute 27 H. 8. 10. that n the executing the Possession in the same d be-Manner and Plight that the Uses are Adin. Secondly, It was refolved, that up-7. B. on the Recovery the Rent in Fee was urch executed accordingly in J. B. by Force 7. B. of 27 H.8. Thirdly, It was refolved, Heir that the Estate being executed Condithe tionally upon the Recovery, the Fine after-

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afterwards by J. B. who had the Con. dition, and by A. A. who had the Estate, to D. did not extinguish the Condition; for tho', generally speak. ing a Fine will extinguish all Manner of Right and Title that a Man hath to Lands; yet if there be an antecedent Agreement to qualify and restrain its Operation, it shall have its Effect according to the Agreement; as here it was covenanted that all Manner of Assurances afterwards to be had, should be to the Uses in that Indenture mentioned, which controlled the general Use of the Fine, and preserved the Condition, according to the Intent of the Parties; for when Men agree and levy a Fine, generally, there all the Conusee's Right shall be extinguished; and when they both agree in restraining and abridging the Use of the Fine, there is no Reafon to extend the Operation of that Fine beyond the Intent of the Party. A Lord may release his Right, referving a Rent, and one may enter into Warranty, with a Salvo to his Rent; and the like Case, as to the Point of Extinguishment, was referved in the Cafe of Putnam and Duncomb, where it feems also to be agreed, that if such Indenture between two, if the Fine be afterwards levied to one accordingly,

Dyer

he is concluded from faying the Fine Feoffment was to any other Use; or if he refuse is made, to take the Fine to those Uses, then 31. Rent, the Fine is only to the Use of the Co-the Feoffee levies a nufor, and his Heirs; and there is a Fine for Case where a Fine was levied by a further Husband and Wife to one who grants rendering and renders a Rent to them two, and 31. Rent, then they agree that a Recovery shall be the old fuffered, wherein the Husband and Wife mains, shall be vouched to those Uses, that and be the Baron and Feme should have the may about the Rent and the Conusee the Land, and Deed. in the Recovery they are vouched, and Moor enter generally into the Warranty; yet 384, 295. it was held the Rent was faved by Virtue of the Agreement; fo that the Rent may be faved either by a Collateral Agreement or a Special Entry; whereas it was infifted in Cromwell's Cafe, that in fuch Case the Salvo ought to appear upon the Record and Fine itself. and not by Matter Dehors. But it Dyer was otherwise resolved; and according- 311. 6. ly it was held in the Case of Cromwell, when it came in Question before. a precedent Feoffment will guide a subsequent Fine; as if there be a Feoffment to two, and their Heirs, to the Use of them and their Heirs, and a Fine is levied to them and the Heirs of one; this will not prejudice their Estate:

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Estate; for they shall both have the Fee still, for in the Fine there is a Necessity that the Fee should be limited to one. A Fine Sur Grant and Render, cannot be averred by Parol to be to any other Uses than what are mentioned in the Fine; so that if an Estate in Fee be granted and rendered back to one in Tail, he shall have it to his own Use; and so if the Conuser keep the Fee, he shall have it to his own Use; but by Deed the Use of a Fine fur Grant and Render may be directed; and if there be a Deed to lead the Uses of such a Fine, tho' there be

2 Co. 75. fome Variance between the Deed and the Fine; yet it shall be said to be to the Uses of the Deed, if there be no other Uses, and that that was the Intent.

2 Co. 76.

If A. has ten Acres and B. has ten Acres, and A. levies a Fine to B. of Twenty, who renders Twenty, it is good; but for Ten, unless there be a Special Agreement; for he cannot render more then he receives: It was objected, that fince there can be no Declaration of Uses upon a Fine sur Grant to Render, but by Deed, and this Limitation by Deed was not good to bind Perkins, who had the Estate of the Land, but was a Stranger to the Deed, and confequently no Deed by

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them would be of any Effect to bind him; and there being no Use but what was implied upon the Fine, there was no Conditional Estate; but it was ananswered that P. was but an Infrument to convey the Land in the same Manner as J. B. and A. A. had agreed, and fo had nothing to do to limit the Uses; for if he would not make the Render as they would have him, he had not been employed; and if after the Fine levied he had refused to render, yet the former Agreement would declare the Use of his Estate, tho' a Stranger, according to the Intent and Purport. So if A. Bargains and Sells Lands to B. and covenants to levy a Fine to him, and that C. shall bring a Writ of Entry, Gc. and so a Common Revovery shall be had, which shall be to the Use of B. and his Heirs, in this Case, tho' C. be but a Stranger, yet being but an Instrument, the Declaration of Uses by the other two shall be good; the Render of C. cannot extinguish the Condition; for his Seisin is but instantaneous, and only to the Purpose to render back the Estate.

There was an Estate in Fee in the Rent, upon the Recovery; but that Rent, and the new one created upon the

the Fine, but that was nothing to the Use of the Land, and could not alter that neither one Way nor other; for tho' there be a new Rent in Being, yet there is no new Use in A. and so his Estate remains Conditional upon a Fine that enures by Way of Release or Extinguishment.

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No Use can be limited unless there 2 Co. 78. be fome other Conveyance, as it feems, i Inft. which passes the Estate; for there it 193. b. 13 Co. 55 feems they are taken as one Conveyance; neither can the Surrender of a

particular Estate be to a Use.

If the Diffeisee limits the Use to one, and the Disseisor to another, and the Conuse to a third, the Use of the Disfeise shall stand; so if the Recoveror limit the Use to one, the Vouchee to another, and the Owner to a third, the Declaration of the Owner shall stand; tho' a Condition concurring with that in the Deed may be averred by Parol, yet no Use can be averred by Parol, when there are Uses contained in the Deed expresly. A Man cannot covenant with his Wife to stand seized to her Use; it seems at Common Law a Use might have been raised by Word, upon a Conveyance that passed the Possession by some solemn Act, as a Feostment; but where there was no fuch Ad,

\* Co. 76. 1 Inft. 312. a. 2 Roll 788.

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o the alter r tho' ere is te rethat Extinthere eems, ere it nveyof a one, d the Dif veror ee to , the and; that arol arol, coved to w a Tord, Pofeoff-

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there it feems a Deed Declaratory of the Uses was necessary; for as a Feoffment which passed the Estate, might be made at Common Law, by Parol; so by the same Reason might the Uses of the Estate be declared by Parol; but where a Deed was requifite to the passing of the Estate itself, it feems it was requisite for the Declaration of the Ules, as upon a Grant of a Rent. or the like. So it feems, a Man could not covenant to stand feized to a Use, Pop. 49. without a Decd, there being no folemn Moor Act; but yet a Bargain and Sale by Pa-688, 444. rol has raised a Use without, and it Holt, has been held to do so since the Sta-Jones, . tute. In Cities exempted out of the Dyer Statute, it has been held, that if a Fine 229. a. be levied of a Rent, no Use can be li-1 Sid. 26. mited of it without Deed; but now by may devife 29 Car. 2. c. 3. all Declarations of to Use. Trust, other than fuch as arise by Implication of Law, are to be in Writing, and figned by the Party, who is by Law enabled to declare fuch Trust, or else it must be by his Last Will in Writing. A Man fuffers a Common Recovery

Off. Mich. and the 14th of November next, by Indenture, he declares that the Uses of all Recoveries hereafter to be fuffered, shall be so and so, and so this Indenture does not declare the

2 Roll 799. Dyer 136. 4.

Uses of the Recovery precedent, tho the Term be reckoned but as one Day in Law; but yet it feems, if there be an Averment, that it was the Intent of the Party in that Indenture, to guide the Uses of the precedent Recovery, it will be good; but Quare fince the Statute 29 Car. 2. whether that will do; for as the Statute of Wills requires that a Will should be in Writing, and if that be not fufficient that is writ, no Averment will help out the Defect; fo the Statute 29 Car. 2. requiring a Declaration of Uses to be in Writing, it seems by the same Reason, no Parol Averment can help it.

A Man covenants to levy a Fine to four, to fuch Uses, and after two die, and it is levied to the Survivors, the Uses shall be directed by the first In-

denture.

Cro. Jac. 310, 512.

A Man grants a Rent of 201. per Ann. and covenants to levy a Fine to these Uses, viz. that if it shall happen the said yearly Rent to be in Arrear, and not a sufficient Distress found, or any Rescous or Replevin be made, then that the Grantee shall enter, &c. in this Case the Rent was in Arrear, and then the Fine levied, and then a Distress taken, and a Replevin sued. Two Judges held that the Use being raised

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to those Averments that were before the Fine; but the other two held it should, the whole being reckoned but as one Conveyance.

A. covenants to levy a Fine of one hundred Acres, within the Year, and after the Year, a Fine is levied but of eighty; it shall be guided by the Co-

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Husband and Wife seized of Lands to them, and to the Heirs of the Huf- Moor band, Bargain and Sell the Land to one 680 P. upon Condition that if they or any of them, their Heirs, Executors, Administrators and Assigns of the Husband, should at such a Day pay 500%. to the faid P. that then it should be lawful for the Husband and Wife, and the Heirs of the Husband to enter, and so hold it as in their former Estate, and that after the Payment, this Indenture, and all Fines and other Affurances should be to the Use of the Husband, and his Heirs, this being Contradictory to what went before, is void, or else shall serve only to direct the Uses of the Fee-simple, after the Death of the Wife. When Uses are declared by a Deed precedent, no Writing will control that, tho' under Hand and Seal, unless it be a Deed; as was the Cafe

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of Jones and Morley, where a Deed declared the Uses of a Fine, to be levied next Hill. Term, to one and his Heirs, before the Fine levied, Husband and Wife. by Writing under Hand and Seal, de clare it shall be to the Use of her and her Heirs; it was held that if the Fine had been pursuant, this would not have controlled the former Deed; but be cause the Agreement was in Hill. Term, to levy it next Hill. Term, and the Fine was levied the same Term, there was a Variance; and fo the former Dece was controlled. If Lands be granted to A. Habendum to A. and B. and their Heirs, to the Use of them an their Heirs, tho' B. can take no E state, because named after the Haben dum, yet the Limitation of the Ule good, and by that they shall both b Jointenants. If a Man covenants to stand seized of all the Lands he has or which he shall afterwards purchal to the Use of A. this will only bin the Lands he then had; for if he a terwards purchase other Lands, no U shall arise upon it; for a Covenant stand seized, is a Covenant that affect an Alteration of the Land itself, which no Man has Power over but the Owner and it is not now in the Nature of

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2 Roll 799 Moor 342. Contract to do any thing but that which reaches the Lands themselves.

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So if one Jointenant covenants to fland seized of the Moiety of his Companion, after his Companion's Death, to fuch Uses, no Use will thereby arise, tho' he does survive his Companion; for he could not then Charge the Moiety. But if a Man covenants to purchase Lands before Michaelmas, and to levy a Fine of them to B. which shall be to the Use of A. and his Heirs, and this is done accordingly, it is good; for this Agreement was not defigned to raise the Uses of its own Force, but only that it should be an Agreement precedent to direct the Uses of the Fine to be levied.

If a Man levies a Fine of his Lands, <sup>2</sup> Roll and covenants, in Consideration of Natural Love, and the Marriage of his Bastard Daughter, that the Conusee shall stand seized to her Use, this is a sufficient Declaration of the Use to her, tho' it be not sufficient upon the Covenant to raise a Use. See about Contingent Uses before, and Title Contingent Remainders.

A Man may have an Affize upon a Owen 86. Feoffment to his own Use, without an Bro. 337. actual Entry, and without Laying an Agreement; for the Statute executes it

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in him; but an Action of Trespass he cannot have, before an actual Entry. A Man may plead that such a one was soized to his Use, without shewing the Commencement of the Use. A Man brings a Writ of Waste, the Writ sets forth a Feossment to such Persons, to several Uses, but does not say the Feossment was to them and their Heirs; and if it were not a Feossment in Fee, the Use could not rise; but it was held well enough, because all the Forms of the Writs had been so; and yet the Plaintiss might have had a general

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Writ, and declared Specially.

A. seized of twenty-five Acres at W. covenants to levy a Fine of them all, and that twenty-four of them shall be to the Use of C. in Tail; and for the other it shall be to the Use of him in Fee, afterwards a Fine is levied of twenty-four; Quere whether the Use of them twenty-four, are not directed

by the precedent Conveyance.

A Man makes a Feoffment in Fer, and afterwards declares by Indenture that this Feoffment was to the Use of himself, and after Marriage with A. to her for Life, and then to the Use of his own Right Heirs, this is a good Limitation of Uses; and after Marriage A. shall have a Use, and in the mean Time he

Hob. 84.

2 Roll 791.

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A Man covenants, in Consideration of Marriage to be had between him and B. to convey certain Lands to their Uses for Life, and afterwards he levies a Fine to those Uses, there is an Estate vested in them, tho' the Marriage should take no Essect; for it was a Declaration of Uses upon the Fine, which is good, tho' there be no Consideration; but if there had been nothing but a Covenant to stand seized to Uses, no Uses had then risen without a Marriage.

And if a Man covenants, in Consi-2 Roll deration of the Marriage of his Son 1922 with B. to stand seized to the Use of his Son and B. and they are married infra annos nubiles, and afterwards they disagree, the Use to B. shall cease; and it seems there is the same Reason the Use to his Son should cease, since the Consideration ceased, the Marriage being the only thing the Use was sounded upon.

A Man covenants to stand seized to the Use of B. and his Heirs, if such an Act be not done, B. dies, the Act is not done, a Use shall arise to the Heir of B. who shall be in by Discent.

T 3 A Man

2 Rell 794.

A Man covenants, in Confideration of Natural Love, &c. to stand seized to the Use of himself for Life, then to his Son for Life, then to D. his Bastard for Life, with several Limitations over, and covenants to make a Feoff. ment for further Assurance to the same Uses; and accordingly a Feofiment is made, yet D. shall take nothing, because the Fcoffment was made but for further Assurances, according to the

2 Roll

795. Mo. 385.

Covenant, by which he could take nothing, if it were only faid to the same Uses, and not for further Assurance. Quare, Whether D. would not take.

Cro. Jac. 180.

A Man covenants to convey his Land to fuch and fuch Uses before Easter next, and covenants to stand seized of fo much as shall not then be conveyed to the Use of the same Persons, none is conveyed before Easter, the Uses of the whole shall rife.

Ven. 168, 371.

Tenant for Life, with Power of Revocation, levies a Fine, and by Deed, ten Days after, declares the Uses of that Fine, which Deed had all the Circumstances required in the Deed of Revocation, and whether the Power of Revocation was extinct by the Fine, or that the Deed of the Declaration of Ules was to be reckoned together, with the Fine, as one Conveyance; and fo

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his Power executed was the Quere; and it was held that the Power was extinct by the Fine, and the Deed afterwards came too late, for the Fine passed it away, and the Deed afterwards shall not devest any thing lawfully vested by that Fine; yet if the Intent at the Time of the Fine levied was to make fuch a Declaration by I Ven. Deed, Quare whether the Fine will 291, 195. extinguish it, but a bare Declaration Deed, Fine afterwards, without full Proof of the very are Intent, at the Time of the Fine levied, but one Conveywill not control the natural Opera-ance, the tion of that Fine. A Man has Power they have to revoke by Deed sealed and signed feets. in the Presence of two Witnesses, and 2 Ven. covenants by Deed, having those Cir-31. cumstances to levy a Fine to other Rep. 250 Uses, which he does, and it was re-Cro. Car folved to be but as one Conveyance, 472. and it should amount to a Revoca-Case. tion. The Deed of itself amounting 2 Co. to a Revocation, because it looked as fomething to be done, and the Fine of itself could not, because it had not those Circumstances.

A Feoffment is made to Husband 2 Ven and Wife, for their Lives, Remainder 290. Seniori puero, Remainder to K. in Fee, Husband and Wife levy a Fine, and by Indenture declare the Uses to

T 4

Husband

## Uses and Trusts.

Moor 104 Husband and Wife for Life, and then to the eldest Child, then to K. in Fee; it was resolved the Fine did not destroy the Estate in Remainder, but it was in Abeyance; and that the Indenture leading the Uses of the Fine put it out of all Dispute that the Remainder should go to the eldest Child, whether Male or Female; and yet it does not appear, there was any Defign before hand, or Agreement to levy this Fine; it was held likewise that the Daughter may aver that feniori puero was intended the eldest Child, Male or Female, 1 Vent. 195. Where two Deeds or Acts done at feveral Times, shall be look'd upon in Law but as one and the fame, see Cro. Fac. 643. Tenant in Tail le. vies a Fine, without Confideration, or expressing any Use, he shall be seized in Tail, as before; for it is by Coveyance of Law that he hath any Estate, and whatfoever Estate he takes by Law, must be rightful, and according to the Rules of Law; and to give him an absolute Estate in Fee, would be to the Prejudice of him in Reversion Quare if it be not the same of a Recovery.

Moor 616. Cro. Car. 433. Vangh

433. Vaugh 43.

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What may be granted to an Ale.

All Lands and Inheritances real may be granted to an Use, but no Inheri-Jones tance personal can be granted to an 127. De as Annuities, and the like; for their having the Inheritance consists in taking the Rents; so he cannot have the Freehold upon the Trust and Confidence to permit another to take the Profits; so Things which are mere Rights cannot be conveyed by Way of Use, as Commons, &c. Ways in Gross : Palm. for a Man cannot walk over Another's 349. Ground to the Use of a third Person. The Lords decreed that the Office of High Chamberlain could not be granted by Way of Use; nothing that pasfes by Way of Extinguishment can be granted to an Use.

A Man seized of the Manor of S. in O. and of divers other Lands in O. suffered a Recovery of all, and limits the Use of all his Lands and Tenements in O. to his Wife for Life, and of the Manor of S. to his younger Son in Tail; it was held the Wife had nothing of the Manor of S.

thing of the Manor of S.

A Devise may be made to a Use; but Quare if the Limitation of the Use be void, whether the Devisee shall be seized to the Use of the Devisor and his Heirs; tho if an Estate passes

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by Way of Extinguishment, no Use can be limited upon it; yet if Tenant for Life surrenders his Estate to him in Remainder, to the Intent to suffer a Recovery, which is accordingly done, if no other Use be limited, it shall be to the Use of him for Life; if they both join in a Feossment to the Use of 3. S. and his Heirs, who suffers a Recovery, and doth vouch, this it seems shall be to the former Uses, because the Use was only to keep the Estate in him, to the Intent that he might be a Tenant to the said Pracipe.

Cro. Car. 268. Hard. 402.

If a Man covenants to levy a Fine to Uses, the Fine must be drawn according to the Covenant, or else he is not obliged to levy the Fine. A. enfeoffs B. and covenants to make surther Assurances, B. leases to A. who then levies a Fine to B. this bears and conveys the Estate for Years, without a precedent Agreement, otherwise it goes in Corroboration of it.

Hob. 273, A Man conveys Lands to one, and 274, 275 covenants to do Acts for farther Assurance, and then levies a Fine to him, this will be to the *Use* of the Bargamee; for the Covenant is a Declaration of the *Use* to him, but that Covenant is to be considered by the Estates that

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pass by the first Conveyance; and it is to be looked upon as a Declaration of no more; as if a Man passes the third Part of his Lands to J. S. and covenants to make further Assurances of his Estate to him, and levies a Fine of all to him, this Covenant shall declare the Use of the Fine to the Vendee, for the third Part; but the other shall have the Use of the two other Parts. A Recovery is suffered to the 2 Leo. Intent the Recoverors should make such 17. Estates, the Uses are not in the mean 189. Time to the Recoveree; for that would prevent the Execution of the Estates.

A Man suffers a Recovery to the Use of himself for Life, Remainder seniori puero in Tail, in contingent Remainder to himself in Tail, he levies a Fine 2 Leo. and declares the Uses by another Indenture to him for Life, Remainder to his eldest Child in Tail, Remainder to himself in Tail; it was resolved the Fine did not destroy the Remainder seniori puero; for it goes in Corrobotation of the Estate, and that the last Indenture declared the Intent of the sinft to mean by seniori puero, either Boy or Girl, according as they should be born first.

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by Way of Extinguishment, no Use can be limited upon it; yet if Tenant for Life surrenders his Estate to him in Remainder, to the Intent to suffer a Recovery, which is accordingly done, if no other Use be limited, it shall be to the Use of him for Life; if they both join in a Feossment to the Use of 3. S. and his Heirs, who suffers a Recovery, and doth vouch, this it seems shall be to the former Uses, because the Use was to 3. S. and his Heirs; yet that was only to keep the Estate in him, to the Intent that he might be a Tenant to the said Pracipe.

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A Fine is levied to four, to the Intent they should make an Estate of the

faid Land to fuch a Person as the Co. nufor should name, and that they should not be seized to any other Use but to that Specially; it was held that before the Nomination they were feiz'd to their own Use; and if the Conusor died before Nomination, to the Use of his Heir; and one Judge held the Co-nusor might name which of the Conufees he pleased, but the other two held not; but he ought to be fuch a one as would take the Estate; and one Jointenant cannot give, from his Com-Quare, If a Man grants two panion. Acres in D. and covenants to levy a Fine for further Assurance, and levies

r Roll

Rep. 103. a Fine of all in D. and he has four Acres there for the Surplufage, whether the Use shall be to the Conusor,

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TO Person that cannot be seized to a Use can pass Lands by Way of 44 El. Bargain and Sale, for it only passes an C. B. rot. Use at Common Law; and the' the 518. Possession and Uses pass both together, Moor tanquam uno flatu, yet there must be 681. a Seisin to a Use in every Bargain and Ackins . Sale, else there could be no Execution by Long. Force of the Statute; yet every Body that comes in by a Bargain and Sale, comes in by the Statute; therefore the King, nor any Corporation, cannot Bargain and Sell; and there feems the same Lands lot Reason for an Alien; but if there be for a Year. a proper Consideration, it seems a Bar-reserving a gain and Sale may be made to any corn, if Body; but then the Consideration must demanded, is a good be Money, for nothing elfe will make Bargain it a Bargain and Sale; and it may and Sale. amount to a Covenant to stand seized, Mo. 262. or an Exchange, but not a Bargain 34. and Sale, without the Consideration of 2 Roll Money. Money given by the Governors of an Hospital is a good Consideration to raise a Use to them in their publick Capacity; and tho' a Body Politick cannot be feized to a Use, yet upon a Bargain and Sale to them, a Trust

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2 Inst. 671.

2 Inft. 675. Dyer 229.

Trust may be limited that they shall dispose of the Rents and Profits of the same amongst the Poor of the faid Corporation. It feems any thing that a Man has a Freehold or Inheritance in may be Bargained and Sold by Force of the Statute; for so are the Words of the Statute; but a Man possessed of a Term for Years, cannot Bargain and Sell it by Force of the Statute 27 H. 8. c. 10. to have it executed, because it is not within the Statute. At Common Law upon a Bargain and Sale, a Use would rise, tho' the Bargain and Sale were by Parol; but now, as to Estates of Freehold and Inheritance, they are restrained by the 27 H 8. c. 16. for now they must be made by Deed indented and enrolled; but a Bargain and Sale for Years was out of the Statute; and therefore might, as it feems, be made by Parol; and Houses and Lands in Cities, where the Mayor, &c. had Power to enrol Evidences, being excepted, it has been fince resolved that a Bargain and Sale is good by Parol there, for the Statute was Defective; for it executed fuch Lands Gc. out of the Statute of Enrolments, but does not enact that the Sale of fuch Estates should be enrolled in those Cities. It feems by the Statute for execuexe new but mu

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executing Uses into Possession, a Rent new created may be bargained, &c. but now it cannot be, because there Kelw.84. must be a Seisin to an Use, or else 4. there can be no Execution by the Sta- Pop. 49, tute, before the Intent of the Party was 50. regarded and supported by Chancery; and this feems to be, my Lord Hale's wary putting of the Case of Jackson, which fee. The Words Bargain and Sell are not necessary to make it a Bar- 1 Inft. 672. gain and Sale within the Statute; but 8 Co. 94. any Words at Common Law, that cro. El. upon a valuable Confideration would 166. have raised a Use, will be sufficient to create a Bargain and Sale, within the Statute; but there it seems that the valuable Consideration must be Money; fo that if a Man for Money covenants to stand seized, or aliens, or demises, grants and to Farm lets, these Words, if the Deed be indented and enrolled, amount to make it a Bargain and Sale; and if the Money be paid but by one, it is sufficient, and shall make the Estate to pass to all, if no Consideration be expressed; yet if it be averred that there was one paid, it is sufficient; but if a Consideration be expressed in the Deed, and be acknowledged to be received, tho' in Truth none was paid, yet the Party and his Heirs

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2 Inft. 672. Dyer 169. Moor 141.

Heirs, are estopped, from saying there was none paid. The Intent of 27 H. 8. c. 10. was to destroy these Inconveniencies that had crept into the Law by Uses, and restore the former Laws for passing of Lands by Matter that is notorious into Practice and Use again; and therefore, left still they should convey by Way of Use, and the Incomveniences remain, was that Statute of 27 H. 8. c. 16. made, which requires the Deed to be enrolled, and fo made notorious in whom the Estate should be; fo that by Force of the Statute, will make no Estate can pass by Force of a Bara Bargain gain and Sale; but where the Deed is enrolled, fo that 'till that Circumstance 782, 790. be had, the Deed is ineffectual. Before this Statute the Use and Possession passed presently, both together tan-Cro. Car. quam uno flatu, upon the Delivery of the Deed; but this Statute requiring another Circumstance, 'till that be had, the Deed is of no Effect; and when it Hob. 189. is had, this Statute is fatisfied; and the Cro. Car. Use and Possession are said to pass both together by Relation, from the Delivery of the Deed, by Virtue of the former Law; this last not abolishing it, but only adding another Circumstance to it, and then leaves the former Law to Operation; so that when the Deed is

Quære whether the Loan of Money and Sale. 2 Roll 2 Inft. 674. Hob. 136. 218. Dyer 218. b. T. Jonas 196. 400.

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afterwards enrolled, it hath Relation, Moor for the Advantage of the Bargainee, 2 Cro. to protect him from all Incumbrances 52, 3. made in the mean Time by the Bargainer, and for him to take Advantage of the Acts done for the corroborating his Estate, and the making good any Yelv. 123. Disposition that he will make in the Interim of the Land. But as for Houses and Lands that are in Cities and Boroughs, where they have the Power of enrolling Evidences, by being excepted out of the Statute, they pass presently upon the Delivery of the Deed.

If a Man Bargains and Sells Lands 2 And. 3. by Deed indented; but before Enrol-161,203. ment he levies a Fine of the Lands, 10 Co.96. to the Party himself, he shall be in Moor 80. by the Fine, tho' the Deed be after- wife if terwards enrolled; for 'till the Enrol- they lie in ment, the Bargainor has the Estate, a City. all those Circumstances not being had which are requisite to make it a good Bargain and Sale; and before Enrol-: ment the Estate passes by the Fine; the same Law of all Conveyances pas-If in the mean ing the Possession. Time the Bargainee dies before En-Yelv. 113. rolment, his Heirs shall take and be in 229. by Difcent; for the Enrolment, as between Bargainor and Bargainee, makes the Estate pass ab initio, by Force of

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Hob. 136. the 27 H. 8. c. 10. which passes the Cro. Jac. Uses and Possession both together in-408, 53.

Stantly.

Where Tenant for Life, with Power Hard.410. to make Leafes to commence after his Death, Bargains and Sells the Land in Fee, the Power does not pass. A Bar-

Ibid. 416. gain and Sale will not pass a contingent Use in the Bargainor, but a Feoffment will. If one Jointenant Bargains and Sells all the Lands, and before Enrolment the other dies, his Part shall furvive; for the Freehold not being out of him, the Jointure remains;

53. Bro. 328.

4. 9.

1Inft. 136. but yet when afterwards the Deed is Cro. Jac. enrolled, only a Moiety shall pass; for the Enrolment by Relation cannot make the Grant of any better Effect than it would have been if it had took Effect immediately; but tho' that Enrolment be made, he that Bargains and Sells the whole shall have the other's Part by Survivorship, tho' the Deed be afterwards enrolled, and fhall relate to the Delivery; because the Relation will work for the Benefit and Advantage of the Bargainee, yet it shall not prejudice the Bargainor; yet in fuch Case, if the Bargainor dies, his Part shall not furvive; for the Relation the Deed afterwards by Enrolment has, **fupports** 

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If the Bargainee, before Enrolment, 2 Inft. Bargains and Sells to another, and then both Deeds are enrolled, according to Cooke, it is good, which feems reafonable that the Relation should as well confirm his own Acts against himfelf, as protect him from the Acts of the Bargainer; but as the Case is reported by Cro. the Judges were divided; Cro. Jac. and it seems by him in another Place, as 53, 408. if it were adjudged not to be good; and Cro. Car. fo it is reported by Hob. A Man Bar- Hob. 36. gains and Sells the Seventh, and ac-Cro. Car. knowledges the Statute the Eighth, Owen and afterwards the Deed is enrolled, 150. and upon an Issue whether the Bargainer Noy 106. was feized the Eighth, it was held that he was not in Respect of the Relation; but in another Case afterwards the 2 Infl. Judges were divided, and feemed to 674 be against it, tho' Coke be express, and Ow. 69. fays that as to passing Estates, the En- 161. rolment makes the Deed relate even as Cro. Car. to Strangers as well as Parties.

A Man feized of a Copyhold in Fee, ow. 70. by the Custom of which Manor, the Wife of every Copyholder that died seized of any Estate, shall be endowed, becomes a Bankrupt, the Commissioners Bargain and Sell the Land; the

U 2 Bank-

569.

Cro. Car. Bankrupt dies, the Deed is enrolled. It was held that the Wife should not be endowed; for now by Relation he did not die Tenant; and this confirms what my Lord Cooke fays, that the Estate shall pass by Relation, even as to Strangers. So if one does Bargain and Sell Land, and takes a Wife, and dies, and then the Deed is enrolled, the Wife of the Bargainer shall not have Dower; for by the Relation the Estate pasfed before the was his Wife; and by the fame Reason, if the Estate shall be faid to pass as to Strangers, ab initio, for their Disadvantage, it shall pass for their Advantage. And therefore if a Bargain and Sale be made to a Man, and he dies, and then the Deed is enrolled, it feems his Wife ought to be endowed.

If a Man Bargains and Sells Lands Cro. Car. by Deed indented to one, and then Bar-317. owen gains and Sells them to another, and the first Deed is enrolled within the fix Dyer Months, the last Bargain and Sale is 218. b. Bro. 128. void; and fo it is if a Man do after the faid Bargain and Sale levy a Fine of the Lands to another, and then the Deed is enrolled, the Fine is of no Manner of Use, and so it is, if the last Bargain and Sale be first enrolled. But if the first Bargain and Sale be

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le be never never enrolled; so as it never takes Ef-Feb. fect, then it seems the Second, &c. shall c. B. rot. stand good, like the Case of two Sur-1307. renders of Copyhold Lands, a Release 2 Inst. to the Bargainee, before Enrolment, is Ow. 70. good, and a Recovery suffered against him is good; for he is Tenant to the Pracipe, by the Enrolment afterwards, which farther proves what my Lord Cooke says, that even as to Strangers, the Relation works; as to passing the Estate it is not material when the Deed is acknowledged, provided it be enrolled within the six Months.

It feems the Bargainee, before En- Cro. Car. rolment, may grant a Rent out of the Hob. 222. Lands, this Relation is not properly a Fiction in the Law; but here are feveral divided Acts that have a Real Effe, which when they happen, are reckon'd at Law but as one Act; whereas a 2 And. Fiction in Law, is what the Law sup- 161. poses to be in effe; and it is really not so; if Tenant for Life be impleaded, the Bargainee of the Reversion shall be received after Enrolment; but yet if one purchases a Reversion, hanging the Writ, he shall not be received. If a Man Bargains and Sells Land, and then a Stranger enters, and the Deed is enrolled, the Bargainee may, as it

feems, maintain an Affize; for now by Relation, it is a Disseisin to him.

If a Man Bargains and Sells Lands. Hob. 223. 4 Co. 71. and then grants a Rent-charge, and then levies a Fine of the Land to the Bargainee, it seems the Bargainee shall hold it charged, because he comes in

by the Fine. A Man makes a Lease Lat. 157. 1 Sid. 310. for Years, rendering Rent, and then Cro. Car.

Bargains and Sells the Reversion, and then a Rent-Day incurs, it seems the Rent does belong to the Bargainee; and fo if a Bargain and Sale be made of an Advowson, and before Enrolment the Church becomes vacant, it feems it belongs to the Bargainee to present; for the Enrolment hath Relation to make the Deed pass, as to

2 Bro. b.8. Strangers, ab initio, as appears from the cont. Cases; a multo fortiori it has between

the Parties themselves; but yet it was Ow. 150. held by the Justices, in Sir Henry Dimcock's Case, that Payment to the Bargainor, by the Lessee, was good, and the Bargainee has no Remedy; which Cafe feems to agree that the Right be-

longs to the Bargainee, but allows Payment to the Bargainer, because the Bargainee, before Enrolment, has not the Reversion compleatly in him; and therefore if the Bargainee demands

the Rent, and there is a Clause of Re-

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entry, and then the Deed is enrolled, the Bargainee cannot enter, because not compleat Grantee before Enrol- Ow. 69. ment; if the Bargainor continues Pof- Noy session after Enrolment, he is a Dissei- 106. for. If a Release be made to the Bargainor, it seems it is good, and shall enure to the Bargainee.

#### When the Envolment must be, and of what.

The Enrolment must be within six Lunar Months after the Date, excluding the Day of the Date; and if the Deed 2 Inft. bears Date one Day, and be delivered 674. the next, or fome long Time after, yet the Enrolment must be within six Months after the Date. If the Enrolment be on the Day it bears Date, it feems it is well enough; for the' when I Leon. an Interest is given to commence from 184. the Day of the Date, that Day is excluded; for the Grantee ought not to take before the Interest was designed him; for that would be to the Prejudice of the Granter; yet where a Time is given for a Thing to be done, if it Hob. 140. be done before the Time, or before that Space it was allow'd to commence from, it is within the Reason of the Allowance of any Time, and so seems to U 4

2 Roll 250. Moor 40. Dyer 218.

be good; and yet it would be good if it were done the last Day of that Time, as the last Day of the six Months, excluding the Day of the Date, because it is within the Time expressly allow'd.

2 Inft. 671. 7 Co. 40.

All Estates of Freehold and Inheritance that pass by Way of Bargain and Sale, must be enrolled; but Estates for Years need not; but if a Use be defigned to be raifed to one upon valuable Consideration of Money, the Deed must be enrolled, tho' that Person was fuch a one that a Use would have rose to him, without the Consideration of Money; but if there be both a Covenant to stand feized, and a Grant for Money, if the Deed be not enrolled, it will rife upon the Covenant. Lands, Gc. in Cities and Boroughs that have the Privilege of Enrolment, are not within the Act of Bargains and Sales, and need not be enrolled at all; for the Intent feems to be that they should be enrolled in the Cities and Boroughs, yet these are only Words to except them out of the Statute, but none to enforce the Enrolment in any other Place. If the Courts of Westminster are adjourned to another Place, yet the En-

rolment must be where the Courts are,

for it is confined to the Courts, and

1649. B. R. Watts v. Dicks. 1 Leo. 56. 11 Co. 24, 25.

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Dyer 229. 2 Inft. 675, 676.

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A Bargain and Sale works no Dif- 9 Co. 106. continuance; for at Common Law no- 10 Co. 96. thing but a Use passed; in which Case a. it was Equity that no more should I Saund. pass than what lawfully might, and 160. the Statute executes the Possession in 327, 232. the same Manner as the Use; therefore Bro. Feoff. if Tenant in Tail Bargains and Sells 332. b. 22. in Fee, nothing but an Estate descendable, during the Life of Tenant in T. passes; for by the Common Law there is no Discontinuance without solemn Act or Livery. If Tenant for Life Bargains and Sells his Land to one and his Heirs, the Bargainee has but an Estate for the Life of the Bargainor, and he is liable to forfeit or to be punished for Waste, and the like; but when Tenant in Tail bargains in Fee, the Bargainee has an Estate to him \* and his

<sup>\*</sup>The Bargainee of a Tenant in Tail, has a base Fee not determined, nor determinable 'till the Entry of the Issue. Salk. 619. I Sand. 260. Took and Glascock was there denied; as also Lit. sect. 612. if literally taken.

Heirs, during the Life of Tenant in 10 Co. 98. Tail; but he is dispunishable of Waste, and his Wife shall be endowed; and the Reason of the Difference is because that the Person that should take Ad-I Sand. 260 vantage of these Things, has passed away all his Right; a Bargainee cannot vouch by Force of a Warranty annex'd to his Estate, because he comes in the Post; but he may rebut upon a 1 Cc. 125. Bargain and Sale of Lands, a Rent 2 Roll may be referved, because the Possession 787. and Use passes both together, tanquam 2 Inft. eodem instanti. The Bargainee of a Re-673. 2 Co. 54. version cannot take Advantage of the Cro. Jac. Non-payment of Rent, upon a De-346. & Co. 92. mand, without giving Notice of the Bargain and Sale; but it seems he may have an Action of Waste and Debt for Rent, without any Notice. When a Man is in Possession, there the Inheritance may be conveyed to him by Way of Release; and if a Man r Inft. makes a Lease for Years, or for Life, \$73. A. and then grants the Reversion to C. for Years, and the Tenant attorns, he may release to the Grantee of the Reversion, to enlarge his Estate. So if a Cro. Jac. Man Bargains and Sells to one for 604. Years, he may release to the Bargainee before Entry; for he has Possession by Force of the Statute; fo if he Bargains

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A designing to convey Lands to B. Grants, Demises, Bargains and Sells mem to C. and before any Entry, releases them to C. and his Heirs, to the Use of B. and his Heirs, the Lands hall pass by Way of Bargain and Sale, ut res magis valeat, Gc. And if C. afterwards chuses to take by Way of Demise at Common Law; yet that 2 Roll hall not devest the Estate of B. C. 707. being but an Instrument to convey: Every Bargain and Sale shall be expounded indifferently between the Parties, 2 H. 7. 5. and not like a Grant at Common Law, a. most against the Grantor; because it was I Roll Equity that always made the Construction of Bargains and Sales. A Freehold Leafes in Law passes before Entry.

### Pleading of Bargains and Sales,

A Bargain and Sale by Deed inden- 2 Inft. ted and enrolled, is but a Deed record- 235. 6. ed, and therefore in pleading, the Pro- 251. b. fert must be made of the Deed itself, 2 Inst. and not of the Tenor of it enrolled;

Lands by Deed indented and enrolled, yet notwithstanding that he may plead his Nonage; for it takes Effect as a Deed, notwithstanding the Enrolment; but if an Infant binds himself in a Bond, and afterwards enrolls it, he cannot plead Nonage to it; for it is now a Record, and it is turned into a Thing of a higher Nature, the Effect of both being the same; but when a Deed is had of Lands, in such Case Lands pass by the Deed, and therefore cannot afterwards pass by Acknowledgment and Enrolment.

2 Inft. 673. Bro. 328.

2 Inft.

673.

A Deed by the Common Law ought to be enrolled for the Husband only, and not for the Wife; but if she do acknowledge it, it shall not bind her If a Man acknowledges and enrolls a Deed, Quare whether he may afterwards plead Duress; for the acknowledging it afterwards is voluntary. If a Man pleads a Deed enrolled, he must shew in what Court it was en-

Cro. El. must shew in what Court it was en88. Bro. 328. rolled; and because it was not done,
8. b. it was held ill, even after a Verdict
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46. cont. because by the Statute the EnrolYelv. 213 ment is to be in some certain Court
and therefore he ought to shew it was

Cro. Jac. according to the Statute; and the faying it was fecundum forman State is

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not sufficient; the Enrolment is Matter 1 Co. 7. of Record, and shall be tried by the 4 Ibid. 71. Record; but the Time of the Enrol- 2 Roll ment is Matter in pais, and shall be Rep. 119. tried by the Country; but this, as it feems, must be understood where the Time of the Enrolment was not entered upon the Record; for where it is, there it is proved of Record; for fince 16 Eliz. the Practife has been to enter the Time of the Enrolment; and therefore it was refolved that where a Man ow. 138. made a Lease for Years on the 10th of 1 Leon. May, and Bargained and Sold by Deed, Moor dated 10th of April, and enrolled also 504. as of that Time, that in such Case no Averment could be taken, but that the Deed was of that Time.

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DY the Common Law, if a Man ha D a Right and Title to a Thing, o 3 Co. 83. a just Debt owing to him, he migh Mo. 638. avoid any fraudulent Conveyance mad to deceive him of that Right or Debt as if a Man had a Right to Good and he that had them fold them b Covin in Market Overt, to alter the 294, 160. Property of it; or if any passes awa Goods to deceive a Creditor; the Acts might have been fet afide; but i the Gift were precedent to the Right or Debt, there was no Way, in fuc Case to set aside the Conveyance; bu the 13 El. and 27 El. have remedie this Inconvenience; by Virtue of which Laws all Conveyances made to deceive Creditors or Purchasers are void, a against them; and if Conveyances an made for good Consideration; yet if the are made with a Defign to deceive Creditors, they are void by those Sta tutes; and if made bona fide, if with out Consideration, they are also void

as against them; but it seems this mul

be understood with several Restrictions

Thus, a Man made a fraudulent Dea

of all his Goods to one of his Credi tors; and it was held within the Sta

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Man ha Thing, o he migh ince mad or Debt to Good them b alter th fes awa r; the le; but i he Righ , in fucl nce; bu remedie of which o deceiv void, a ances ar ret if the deceive those Sta if with

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tute, and void against another Creditor. Thus if one be indebted to feveral, and then makes a Gift of all his Goods Cro. Car. to his Son, in Confideration of Natu- 550. ral Affection, tho' this Gift be made Rep. 306. bona fide, yet it shall be void against 1 Sid. Creditors; but if it shall be made be- 1 Vent. fore the Debts contracted and bona fide, 194. it seems it would not be set aside; for Mod. Rep. 119. the Intent of the Act was not to fet afide all voluntary Settlements; but if a Gift be made upon any Trust, either expressed or implied, between Donor and Donee, tho' made bona fide, yet it shall be within the Statute; for all Statutes made for the suppressing of Fraud are liberally expounded; and therefore the Word Forfeiture, tho' mentioned among Penalties, and the like, shall be expounded to extend to all Forfeitures to the King and Subject. 50E. 3. relieves Creditors, when their Debtors By to Privileged Places, having given their Tenements and Chattels to their Friends in Trust, and so does 2 R. 2. Stat. 2. c. 3. and by 3 H. 7. all Deeds of Gift of Goods in Trust, for the Persons that made the Gift shall be of no Force. By the 27 Eliz. it is enatted, That if a Man fettles Lands to Uses, with a Power of Revocation, and afterwards fells the Lands for valuable

Confide-

### 304 Fraudulent Conveyances.

·Consideration, that the former Uses shall be revoked to him; but the Act only mentions Purchasers; and therefore as to Creditors, if it were not made with an Intent to deceive them, it feems it shall not be avoided by them; for they are not mentioned in the Clause; and if a Man, having a future Power of Revocation, Bargains and Sells the Land before his Power commences, yet it is within the Act: fo if the Power of Revocation be referved, with the Confent of A. and he conveys his Land, not having revoked, the Conveyance shall be good. So if one having a Power of Revocation, extinguishes by Feoffment, and then fells, the Sale shall be good; for the Feoffment comes within the Law of all fraudulent Conveyances.

and then another bona fide, without Rent or Fine, the fecond Lessee shall not avoid the first Lease; for no Purchaser shall avoid a former fraudulent Conveyance; but a Purchaser for valuable Consideration, which excludes all Consideration of Blood, and the like; and he that will, by Virtue of these Acts, avoid a former fraudulent Conveyance, must be such a Purchaser, and must also come in without any

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Fraudulent Conveyances. 309

praud or Guile; if a Gift be made to Moor deteive one Creditor, it is void against 5 Co. 60: all Creditors that are within the Sta-Gooche's tute; it is not necessary that he that Case contracted the Debt should make the fraudulent Conveyance; for if a Man binds himself and his Heirs in a Bond, and Lands descend to his Heir, who makes a fraudulent Conveyance of those Lands, the Creditor shall avoid it.

If a fraudulent Conveyance be made 5 Co. 60. to deceive Purchasers, and one having b. Notice thereof purchases the Land, he hall avoid the former fraudulent Conveyance, notwithstanding his Notice; for it is by the Statute made absolutely void. The Father makes a Lease to 6 Co. 72.] the Son, who makes a fraudulent Assymment of that Lease, the Father dies the Son fells the Inheritance, the Vendee hall avoid the Term; and if the Son 10 Co. 17. had only fold the Term, the Vendee hould have avoided that fraudulent Mignment. A Man makes a Jointure to his Wife, with an Intent to deceive Purchasers, they shall avoid it. A to Co. fir Feofiment was made to deceive Crelitors; and tho' by Event, the King was heated of his Ward, yet being only that Intent and Purpose, it was not be extended further. So a Redemise to 351. 8.

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### 306 Frandulent Conveyances.

A. to the Intent the Wife of the Tenant should not be endowed, during the Life of A. it is not to be extended to

any other Intent or Purpose.

2 Co. 54.

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2 70.

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2 And.

Cro. El.

If Lands are given to the King, with an Intent to deceive Purchasers, the Purchaser shall avoid such Gift; so if a Reversion be granted to the King, on Purpose to hinder Docking the Reversion. and the Tenant fuffers a Recovery, and fells, and dies without Issue, the Purchaser shall hold against the King.

#### Pleadings relating to fraudulent Conveyances.

5 Co. 60. A fraudulent Conveyance may be given in Evidence upon the general I fue, and need not be pleaded. Covin must be pleaded expresly by Averment, and cannot be prefumed; and therefore in a Special Verdiet, if the Jury find fuch Circumstances in the Case, as might very well have induced them to ro Co. 57. find Fraud, yet if they do not exprely

Yelv. 196 find it, it shall never be presumed. Cro. Jac.

The fraudulent Gift is good against every Body but Creditors, Gc. it stands between the Parties themselves; for it feems by the Cafe of Hawes and Load er, that the Executors cannot main

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### fraudulent Conveyances. 307

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the Tethe Donee, even to fatisfy Creditors; but ring the moad the Creditors, they are all liable ended to One held of divers Lords in his Hands. by Heriot Custom, and to the Intent to ng, with deceive one, made a Gift of all his Dyer the Pur-Beafts Heriotable, the Lord aggrieved 2 Leon. if a Rebrought his Action for the Value of all 8, 9. on Purthe Beasts; and held by two Judges eversion, that it was well, and another cont. and ery, and he Purby one that they ought to have joined. ng.

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A Man having a Lease for Years, Co. Ling. forges another for Ninety, and fells the b. forged Lease, and all Right and Title to the same, and his Interest in the Land; and altho' by the general Words, his true Interest in the Land passed, yet it was resolved he was not a Purchafer for a valuable Confideration, within the Statute; for the Purchase and Contract was for the forged Term; tho' in a Gift of Goods, if one continues the Possession, it is a great Sign of Fraud; 1 Rep. 3. yet in Mortgages it is none at all. If a Man settles Lands in Trust upon himself for Life, and then to his Child, not fraudulent, and then for valuable Consideration sells the Land to another, 2 Roll Quare whether the former Conveyance shall be avoided during his Life; and if a Man enfcoffs others with Power of Re-X 2

### 308 Fraudulent Conveyances.

vocation, and then covenants to stand seifed to another's Use, who fells the Land, the first Feoffment is not hereby avoided. the Covenant to stand feized, being only upon Confideration of Blood, which is not a Consideration that will avoid a precedent Estate. A Woman Covert purchases Land with the Money she had in another's Name in Trust for her, the Trustee jacens in extremis, at her Request makes a Lease for two hundred Years in Trust for her, upon Consideration, that if he should survive the First of June, and pay Twelve pence, the Lease should be void; he does furvive, but does not pay, and then for 100% makes a Lease to another, without any Direction from the Feme; and whether the fecond Leffee should avoid the first Lease, or no, was the Question, but not resolved.

Moor

Cro. Jac.

A Man binds himself in a Bond to pay Money, and then in a Statute to make such a Conveyance, &c. a fraudulent Conveyance is made contrary to the Defeasance of the Statute, tho the Conveyance be void against the first Debtor, yet it is a Breach of the Consideration of the Statute, and he shall be satisfied before the Debt upon Bond.

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### fraudulent Conveyances. 309

If one makes a Lease for Years, with a Proviso to be void upon Payment of 10s. this Lease will be void against Purchasers; but if it be a Mortgage for a considerable Sum of Money, tho' it be in the Power of the Mortgagor, yet it is not void.

So if one promises a Woman, before Cro. Jac. Marriage to make her a Jointure of 4551000 l. a Year, and after Marriage makes a Lease to commence after his Death, for 100 l. a Year, with a Proviso that on making the Settlement the Lease should be void; yet it was held a good Lease against the Purchasers. And a voluntary Settlement was held void against Purchasers, though there appeared no Circumstances of Fraud in it.

A Lease in Trust for his Daughter and Heir to take the Profits to raise her a Portion, if she married with the Consent of the Father, then in Trust for her after Marriage, it was held to be well enough, and not void; for the Marriage made it a good Consideration, 1 Sid. and the Man might have Respect to that in marrying her.

So, tho' a Deed be fraudulent in its 1 Sid. 134. Creation, yet by Matter ex post facto, Dyer 9. it may be good; as if one makes a 25.

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### 310 Fraudulent Conveyances.

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Cro. 455. Concealing of a Conveyance will not make it *fraudulent*; when upon revealing it it appears to be good.

Hard. 398. 1 Leo. 150, 151, 237, 8.

If a Settlement be made in Confideration of the Marriage, the Consideration will so far extend to all the Estates raised, tho' not within the Statute, as to cause that they shall neither be construed fraudulent or voluntary. If Lands are settled in Consideration of Marriage, and a Portion, with a Power to charge them with 2000 l. which is done by Lease and Release, the former Conveyance shall never be presumed to be fraudulent, and void by the last, tho' the Power be not strictly pursued as it cought to be.

2 Roll Abr. 34. A Man makes a fraudulent Conveyance to prevent the Escheat, and then commits Felony, the Land shall go to the Lord; so if one commits Treason nine Days after the Conveyance upon his Son, the Conveyance shall be presumed Fraudulent; otherwise, if it were made in Pursuance of an Agreement made before. A Man and his Wife seized in Fee of Lands, in Right

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Marriage of their Son, and 500 l. paid

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for a Portion', levy a Fine to the Use of the Father and his Wife for their Lives, then to their Son, and his Heirs; Proviso that it should be lawful for the Father to revoke, with Confent of four Persons, the Relations of the Son's Wife; the Father dies; the Mother, without Consent, sells the Lands for valuable Consideration to other Persons, it was held that the Vendee should not avoid the Settlement, the Power of Revocation being very much out of the Power of them to effect; the Consent of such being necessary over whom the Father and Mother could not be prefumed to have any Power. Otherwise, if the Consent were lodg'd with those Persons, that may be supposed to be at the Disposal of the Persons to whom the Power is referved .- Fines levied by Fraud shall not ; Co. 77. bind; fee here feveral Cases of Covin. - 2 And. A Sale in Market overt will not bind the Hob. 339. Property of Goods. — Tenant for Life, with Remainder to another in Tail, with Power of Revocation, becomes indebted to the King, the whole Estate is subject to the Debt, though there be no Revocation, nor Averment of Fraud

made.

### 312 Fraudulent Conbeyances.

made.—He that makes a fraudulent Gift within the Statute, must be the same Person that afterwards makes a Sale of the Lands.—A verbal Agreement before Marriage, will be of Effect to prevent its being said to be fraudulent.

1 Vent. 194. Cro. Jac. 454.

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# CASES

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adjudg'd subsequent, in Time, to these in the foregoing Treatise; and a few others omitted by the AUTHOR.

SIR John Trevor, late Master of the Rolls, being seized of the E-state in Question, which was the ancient Estate of the Family, and of the Value of 239 l. per Ann. or thereabouts, on his Marriage with Jane Sir J. T. Puleston, Widow, enters into Articles with bis on the Twenty-third of October, 1669. intended with the said Jane, and with William Wife and Salisbury and Sir Richard Lloyd, as Trustees, her Trustees, whereby, in Consideration of the intended Marriage, and of the Love

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ration of an intended Marriage, to convey to the Truftees, to the Uses following.

in Conside- Love and Affection he had and bore to the faid Jane, and the Heirs Male of their two Bodies, he doth for himfelf. his Heirs, Executors and Affigns, covenant, promife and grant, with the faid Trustees, their Heirs and Assigns, that he would, at his own Costs and Charges, before the Fnd of two Years next after the Date thereof, at the Request of the faid Trustees, their Heirs and Assigns, settle, convey and assure to the faid Trustees, and their Heirs, as they or their Heirs, or their Counsel should direct and appoint the Lands in Queftion, to the feveral Limitations and Uses in these Presents mentioned and expressed; and also in the faid Settlement and Conveyance, as should be agreed on by the faid Sir John Trever, William Salisbury and Sir Richard Lloyd, and to no other Use or Uses

To the We what soever, viz. to the Use of Sir of Sir I.T. John Trevor for Life, without Impeachthen to the ment of Waste, and after his Decease, Use of his to the Use of the said Jane Puleston, intended for her Life, and after her Decease to Wife for Life, Re- the Use of the Heirs Males of the Body mainder to of the faid Sir John Trevor, upon the Body the Use of the said Jane Puleston to be begot-Males of ten, and the Heirs Males of fuch Heirs of Sir J.T. Males issuing; and for Default of such on the Bo- Issue, to the Use of the Right Heirs of Sir

bore to Male of himfelf, gns, coith the gns, that d Charars next Request eirs and e to the as they 1 should in Quefons and ned and d Settleould be Trever, Richard or Uses of Sir mpeach-Decease, Puleston, cease to he Body theBody e begotch Heirs of fuch

Heirs of

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Sir John Trevor for ever, with a Co-dy of the venant from Sir John Trevor, with the faid J. P. Trustees, and their Heirs, that the said Default of Premisses should remain to the said Fane suchliste, to Puleston, during her Natural Life, af- Heirs of ter the Death of the faid Sir John Trevor, the Cove-free from all Incumbrances, and a Co-and Sir venant in the Words following: And J. T. furthe faid Sir John Trevor doth further, ther Covefor him and his Heirs, grant and agree the Truto and with the faid Will. Salisbury and fees, that Sir Richard Lloyd, their Heirs and Af- in Cafe the Uses figns, that in Case the Uses and Limi- before are tations in these Presents are not here-not truly after well and truly raised, according that the to the true Intent and Meaning of these faid J. T. Presents, that then the said Sir John Shall stand Trevor, and his Heirs, shall stand and a further be seised of all and singular the said Pre- Affurance misses, until such Time that a further the same Assurance of the said Premisses be made, Uses. to such Use and Uses, Intents and Pur- The Truposes, as herein before-mentioned, ex-without pressed and declared; and soon after the ever ba-Marriage took Effect, and Sir John had quested a Issue by the said Jane, the Plaintiff, Settlement. his eldest Son, the Defendants, three Sir J. T. younger Sons, and two Daughters; Fine, and these Articles were laid by for several in order to Years, and nothing further done upon to disinhethem; but in 1692. Sir John Trevor declared levies a Fine of these Lands; and the other Ufes. two

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two Trustees being dead, without ha: ving ever requested a Settlement, the Plaintiff, some Time after this Fine, marries against his Father's Consent and by feveral other Acts of Weakness and Disobedience, became so obnoxious to his Father, that 29 Septemb. 1699. Sir John Trevor makes a Deed, wherein he recites these Articles, that he had thereby agreed to fettle and convey these Lands to the Use of himself for Life, Remainder to the said Dame Fane his Wife, for Life, Remainder to the Heirs Males of his Body, on the Body of the faid Dame Jane to be begotten; and reciting that his Son Edward (the Plaintiff) was very weak and difordered in his Understanding, and that all Methods to improve him had been ineffectual; and also reciting, that he had married with a strange Woman, and thereby brought Difgrace on his Family, to the Ruin thereof; and that he was of a furious Spirit towards his Brothers and Sifters; therefore, and for several other Causes and Considerations, Sir John declares that it was the Intent and Meaning of the faid Parties, at the Time of levying the faid Fine, that the same should be and enure to the Use of himself for Life, without Impeachment of Waste, then to the Uſe

out ha ent, the is Fine, Consent, eakness noxious b. 1699. wherehe had convey felf for Dame mainder on the be beon Edeak and ng, and nim had ng, that ge Wograce on of; and towards re, and onfiderawas the Parties, d Fine, nure to without to the

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Use of the said Dame Fane for Life. Remainder to the Defendant, Fohn Trevor, his fecond Son, and the Heirs Males of his Body, with like Remainders to Arthur and Tudor Trevor, his two youngest Sons, with Remainder to his own Right Heirs; and a Proviso. that if any of his three younger Sons should marry without his Consent, that then he should have Power to demise or leafe the faid Premisses for the Term of 500 Years, referving Rent, or no Rent, as he thought fit, to any Perfon or Persons he should think fit; and on the 16th of October next following, he makes the like Settlement of other Lands, of the Value of 6301. per Ann. and upwards, and the Twentieth of May, 1717. dies intestate, leaving a Personal Estate to the Value of about 40000 l. and also a Real Estate in Ireland, of the yearly Value of 750 l. or thereabouts, being let out on Leases for Lives, and worth to be fold, about 24000 l. and also some new purchased Lands in England, of the Value of 300 l. per Ann. or thereabouts, and by his Death the new purchased Lands, and the Estate in Ireland, descended to the Plaintiff, his eldest Son, who also became entitled to his Share of the Perfonal Estate, which amounted to upwards

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wards of 9000l. After his Death 70hm Trevor entered on the Lands fettled on him, as aforesaid, for which he being provided for beyond his Share of the Personal Estate, could have no Part thereof, by Reason of the Statute of Distributions; and this considerably augmented the Shares of Edward the eldest Son, and the other Brothers and

tiff, the eldeft Son, Bill to bave a Specifick Execution of thefe Articles.

The Plain- Sisters; notwithstanding which, the Plaintiff, the eldest Son, brought his brought his Bill to have the Trust performed, and a specifick Execution of these Articles, and that the Lands comprised in the Articles may be conveyed to him, and the Heirs Males of his Body, according to the Purport of the faid Articles, and to have a Discovery of the Deeds and Writings, and an Account of the Rents and Profits from the Time of his Father's Death. It appeared that these Articles had been thrown by for feveral Years as useless, and were, after Sir 70hn Trevor's Death, found at the Bottom of an old Trunk; but the Plaintiff having gotten the same into his Custody, brought this Bill for a specifick Performance thereof.

For the Defendants it was infifted, that though by the first Part of the Articles they feemed to be only executory, yet by the last Part, by the Co-

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renant to stand seised, that they were For the Defendant, actually and immediately executed ; That no that he thereby covenanted to stand Settlement feifed to the before-mentioned Uses, baving ill a Settlement was made thereof the Ufes accordingly; that no fuch Settlement continued having ever been made, the Uses con-to be exce tinued to be executed by Virtue of that Virtue of Covenant; that by these Uses he was the last Covenant; plainly Tenant in Tail, then by the and that Fine had bound his Issue, and made by these himself Master of this Estate, which he was plainmight settle and dispose of as he thought ly Tenans fit; that he was Tenant in Tail, ap-in Tail, peared from this, that if a Settlement the Fine had been made pursuant to the very had bound Words of the Articles, he had an Estate- the Ifue, and made tail in himself; that wherever the An-bimself celtor takes an Estate for Life, and af-Master of the Estate, terwards in the same Deed, a Limita-which be tion is made to the Heirs Males or Heirs might fer-Females of his Body to be begotten; the as be that in fuch Case the Heirs Males, or fin. his Heirs Females take by Descent, and not by Purchase; that this is a known and standing Rule of Law which has never yet been shaken; that the Limitation after to the Heirs Males of such Heirs Males was Tautology, and of no Use; that it was saying no more than what the Law would have faid without those Words; and therefore,

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if there were two fuch Limitations one after another, they would not impeach or controul the first Limitation; and this appears clearly by Shelley's Cafe. I Co. and in a Case of \* Legat and infra Let- Sewell in this Court, where the Judges of C. B. by Certificate under their Hands, gave their Opinions accordingly, that the Settlement being actually executed, the Law was open, and the Plaintiff had no Occasion to come into this Court for a fpecifick Execution of what was already executed; that this was plain from the Covenant, that the Wife should enjoy during her Life, free from Incumbrances; and this Covenant does not go to the whole Estate agreed to be fettled, but only to the Estate for Life of the Wife; that if the Islue were intended to take as Purchasers, this Covenant would have been extended to the whole Estate, as the Issue under this Marriage Contract were Purchasers of it, as well as the Wife; but the Heirs Males of the Body of Sir John Trevor coming in only by Virtue of the Intail, it would have been vain and idle to have carried that Covenant beyond the E state for Life of the Wife, because it would only be a Covenant for himself that the Clause without Impeachment of Waste did not necessarily argue at Eftate 3

ions one impeach on; and 's Cafe. gat and e Judges er their cordingactually and the ome into cution of that this that the ife, free Covenant te agreed e Estate the Issue afers, this tended to ander this hafers of the Heirs n Trevor e Intail, it e to have d the E occause it

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Estate for Life in Sir John Trevor; that it was for the Sake of the intervening lointure to his Wife, which would have obstructed that Power without exmess Words; and he might have been enjoined for Waste in this Court, for the Preservation of her Jointure, if he had not referved to himself an express Liberty of committing Waste; that this Court was not bound in all Cases to carry Articles executory (admitting this were fo) into Execution; that if the Nature and Circumstance of the Case were fuch as to make it unequitable and unconscionable, this Court would never decree a specifick Execution of Articles; that in this Case it was unrasonable to ask Assistance of this Court, when so much greater Compenation was to come to the Plaintiff; hat by the Descent of so a Real Estate. and the Accession of so great a Share of the Personal Estate, the Plaintiff was abundantly recompensed for the Value of the Estate in Question; that t was in Sir John Trevor's Power have prevented them of either, and is not doing it was equivalent to an spress Devise thereof to him, and therer himself or ought to be looked on as a Satiseachment action; that in the Case of Blandy argue at ligmore, in this Court, where the Huf-

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band, before Marriage, gave a Bond to leave his Wife worth 500%. if she fur vived him; and he afterwards died in testate; and her distributive Share cam to above 500 l. this was adjudged Satisfaction of the Bond; that Sir 70h Trever plainly took it, he had a Powe over this Estate; that his Judgmen was fo well known, that he neve would have attempted it, if he had not thought it clear; that the Di obedience and Behaviour of his Son the Plaintiff, were fuch, as put him un der a Necessity of considering the Na ture and Extent of his Power over this Estate; and since he, who was so goo a Judge in Cases of this Nature, ha disposed of the Estate, this Court would prefume he had Power fo to do, an that the Motives of his Proceeding her in were just and warrantable.

But decreed for the Plaintiff.

But notwithstanding these Reasons, was agreed for the Plaintiss; my Lor Chancellor said, this ought to be considered now as if this Bill had been brought within two Years after the Making of the Articles; that if a Bill had been then brought, there could have been no Doubt but that a Settlement must have been decreed pursuant to the Intention of the Articles; that upon Articles the Case was stronger than or

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a Bond to f she fur s died in nare cam ljudged Sir 70h d a Powe Judgmen he neve f he ha the Di his Son t him un g the Na r over thi as fo goo ature, ha urt woul o do, an eding her

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Reafons, my Lor to be con had bee er the Ma a Bill ha ould have Settlemen ant to th that upo er than d a Wi

a Will; that Articles were only Minutes For the or Heads of the Agreement of the Par- Intent of the Artities, and ought to be so modelled when cles was they come to be carried into Executi- that Sir on, as to make them offectual; that have but the Intention of the Parties was only an Estate to give Sir John Trevor an Estate for for Life. Life; that if it were otherwise, it would have been vain and ineffectual; and it would have been in his Power, as foon as the Articles were made, to have defroved them; that then the Confideration of Love and Affection which he had to Fane, and the Heirs Males of their two Bodies, would have run thus; that he did, in Confideration thereof, lettle an Estate on himself, which he might give away from his Heirs Males whenever he thought fit; that this was much stronger, by Reason of the Limitation, and to the Heirs Males of such Heirs Males issuing; that the Confruction contended for by the Defendant, would make these Words pertealy useless and idle; that he did indeed admit it to be so reported in Shelley's Case, 1 Co. but he faid, 1st, That was not material to the Principal Point in Question there. 2dly, That in Anderson's Report of that Case, nothing like it was taken Notice of, and he aid, that few or none of the Points reported

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reported by Lord Cook, were the Refolutions of the Court. 3dly, That the Reason of the Case was, for that if it had vested in the eldest Son by Purchase, and that Heirs Males of the Body should have been a Description of a Person; that then, if he had died without Issue, there had been (as was then held) an Estate-tail, and none of the younger Sons could have fucceeded it; but this has been held otherwise fince that Time, and a Judgment in Point, in Carter's Reports, (as he remembered) that the Estate-tail should go to all the Sons fuccessively, notwithstanding its vesting in the eldest Son by Purchase; that he did not know how the Case of Legat and Sewell was; but Articles to if it were as cited, he thought it not make the Law; that the Intention of the Articles was plain, to make the Issue of that riage Pur- Marriage Purchasers; that they were wholly relative to a fubsequent Settleother Uses ment to be made, that the Agreement to fettle to the Uses therein, and also in the faid Settlement to be agreed upbe raised on, could only be intended to such by the Ar- other Uses as were necessary to make ricles more, the Settlement effectual; and that it repugnant could never be intended other Uses or contrary inconsistent with, and repugnant to those Articles; that if that had been their

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Intent, it had been in Effect but Agreement with the Trustees to settle those Lands as he thought fit; that the other Uses to be agreed upon, must not be fuch as would overthrow the prefent Uses, but fuch as would establish and support them; that this could only be by a Limitation to Trustees to support And if the the contingent Remainders; that this contingent Limitation to the Heirs Male of his Uses there Body was in Effect but a Limitation to mentioned, bad been his first and other Sons; and if the Ar-destroyed by ticles had been so penned, would not a Fine, the Court this Court have decreed a Limitation to of Chan-Trustees to preserve them? or if by cery would Fine, or otherwise, they had been de- them up stroyed before they took Place, would again. not this Court have fet them up again? that the Limitation to the Heirs Males of his Body, upon these Articles, was but a contingent Remainder, and yet fuch as within the Intent of the Parties ought to be preserved; that the Covenant to stand feifed was until fuch Time as the Uses therein were well and truly raised, according to the true Intent and Meaning of the Articles; that if a Settlement had been made Defective in any Particular, that would not have been final or conclulive; that a fecond Settlement must have been made till the Uses therein Y 3 . were

were well and truly raifed, according to the true Intent and Meaning of the Articles; that if a Settlement had been made Defective in any Particular, that would not have been final or conclufive; that a fecond Settlement must have been made till the Ules therein were well and truly raised; that this Covenant for ever fablisted till such Settlement were made; that he did not believe it was Sir John Trevor's Opinion, that he was absolute Master of this Estate, and might dispose of it as he thought fit; that if that had been his Opinion, he would have thought it fufficient to have levied a Fine thereof, without transmitting down his Son to Posterity with such a Blemish; that the Reason of that could only be to difcourage his Son from attempting to break in to the Settlements he had made of this Estate; that if it were otherwife, he thought it no Imputation on Sir John Trevor's Judgment; that the Provocations he might be under from his Son's Disobedience and Misbehaviour, might fo far biass his Judgment, as to incline him to think he had Power over this Estate, that he would not look on these Settlements in 1699. as made by Sir John Trevor, Master of the Rolls, but as made

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made by a Father, provoked by the undutiful Behaviour of an eldest Son; that he hoped never to fee the Time when this Court should so far have Power as to judge what Behaviour of a Son should amount to a Forfeiture of his Estate; and therefore thought, if the Settlement had been made, no Mifbehaviour of the Son could amount to a Forfeiture of it; that as to the Estate descended on the eldest Son, this came to him by Accident, it was not given to him by his Father in Satisfaction of the Articles; and there may happen a Case where no Estate at all may descend to an eldest Son; and if a Father, upon fuch Articles should have Power to defeat an eldest Son, and leave him no other Provision, it would be of dangerous Consequence to establish a Precedent of fuch a Power; that tho' the eldest Son in this Case happened to be well provided for, so were the younger Sons too; and as they were fufficiently provided for, there was the less Reason to take away this from the Eldest; that this Estate being specifically agreed to be settled, it was a Trust for the eldest Son, which he came here to have an Execution of, and not to have a Recompence or Satisfaction for it; that this Trust passed with the Lands into whole

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And there whose Hands soever they came, and fore a Concould not be defeated by any Act of veyance the Father, or the Trustees; and therequas decreed to be fore decreed a Conveyance to the Plainexecuted to tiff, and the Heirs Males of his Body. the Flainand an Account of the Profits from the tiff, and the Heirs Father's Death, and the Deeds and Wri-Males of bis Body; tings to be delivered up. Trin. 1719. and an between Trevor and Trevor. This De-Account of the Pro- cree was affirm'd in the House of Lords. fits from the Father's Death, and the Deeds, &c. to be delivered up.

## Hill. 11 Geo. in Chancery.

Modern Cases in Law and Equity, 2d Part, 128.

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HE Father of the Plaintiff, and the Defendant, in Confideration of his Marriage with their Mother, and of a Portion in Money, did in the Year 1673. article to fettle his Estate to the Use of himself for Life, then to his intended Wife for Life, then upon Trustees, to preserve contingent Remain ders, then to the first Son of that Marriage, and to all and every the Sons Gc. in Tail Male, with several Remain ders over, with Power to make a Join ture to any Wife of 1000l. per Ann. and a Proviso that it should be lawful for him, by and with the Confent of the Trustees, to fell the Estate, and with

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the Money arising by such Sale, to purchase other Lands, and to settle the same to the like Uses, as in the said Deed,

dated Anno 1673.

Afterwards the Father fold the Lands, and with the Money purchased other Lands, now in Question; and in the Year 1692. he fettled the new purchafed Lands, by and with the Confent of the Trustees, in the first Settlement, to the Use of himself for Life, Remainder to the Defendant for Life, (who by the first Settlement had an Eflate-tail, Remainder to Trustees, to preserve contingent Remainders, then to his first and every other Son in Tail Male, with feveral Remainders over, with a Power to make a Jointure to any Woman he should marry, of the yearly Value of 600l. and foon after the Father died.

Then the Defendant, who was his eldeft Son, in Consideration of his Marriage, and of a Marriage-Portion by Deed, dated 1698. conveyed the new purchased Lands to Trustees to the Use of himself for Life, then to his intended Wife for Life, then to Trustees to preserve contingent Remainders, then to his first and every other Son in Tail Male, with several Remainders over.

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The Defendant, Thomas Reeves, having only a Daughter, and no Issue Male by his faid Marriage, would now fell these Lands, alledging that the Remainders limited to the Issue Male, were voluntary, not being within the Consideration of the Settlement made

by him in the Year 1698.

Therefore this Bill was exhibited by the next in Remainder to obstruct the Sale, and to oblige the Trustees to enter to preserve the contingent Remainders, and that the Deeds and Evidences may be brought into Court to know how the Title stands, he fuggesting that by the Marriage Articles of their Father, dated Anno 1673. he covenanted to settle his Estate, as aforesaid, but with a Proviso to fell the same, by and with the Confent of the Trustees, and to purchase other Lands, and to fettle them upon the same Uses, as in the first Settlement, Gc.

And it was argu'd for the Defendant, that the Settlement in 1673. made upon the Marriage of the Father, both of the Plaintiff and Defendant, though mentioned to be by Articles only, was and is a good Settlement, by Way of Covenant to stand seised; and that the Defendant is by the express Words of that Settlement, made Tenant in Tail of the Lands fold, and the Proviso be-

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ing to fettle the new purchased Lands to the fame Ufes, as in the first Settlement, it was not in the Power of his Pather to make him Tenant for Life, by any other Settlement whatfoever; to that he must still remain Tenant in Tail of the new purchased Lands, and that Settlement made by his Father in the Year 1692, when he purchased those Lands as far as it crosses the Limitations in the first Settlement is entirely void, being voluntary; so that the Settlement made by the Defendant in the Year 1698. upon his Marriage, is good, and fuch of the Lands which are not contained in that Settlement, the Defendant may fell, and the Plaintiff hath no Right to contest the Sale, even of those Lands, he being no Ways within the Confideration of that Settlement.

On the other Side it was insisted for the Plaintist, that this Settlement made by the Father, in the Year 1692. of the new purchased Lands, appears on the very Face of it, to be made in Consideration of the Settlement made by him in the Year 1673. which tho' mentioned to be by Articles; yet strictly speaking, those Articles amounted to a Covenant to stand seised, and the Settlement made in 1692. being in

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Execution of that Covenant, and acquiesced under ever since it was made. must be now taken as a full and entire Execution of that Covenant; and tho' the Father could not be compelled by a Court of Equity to make the Defendant Tenant for Life, who by the first Settlement was Tenant in Tail. yet the Father having of his own Ac cord, and with the Confent of the Trustees, made this Settlement, and no Objection made to it, during his Life, the Defendant shall not be admitted to fay it is not good, it not corresponding with the Proviso in the first Settlement.

This is not the like Case of Wakely against Wakely, where the Father on his Intermarriage, &c. articled to convey his Estate to the Use of himself and his Wife, for Life, Remainder to the Heirs of their two Bodies; and afterwards he had Issue a Son, who coming of Age, the Father, by his Lat Will, which he mentioned to be in Execution of the Articles, devised the Estate to his Son for Life, Remainder to his first and every other Son, &c. Tail Male, with feveral Remainders over, and afterwards the Son brought his Bill in this Court, to be relieved against this Devise, it not corresponding

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ponding with with the Articles; and the Court declared that tho', by the Equity of the Articles, the Son should be Tenant in Tail; and if he had sued in this Court, to compel the Father to an Execution of the said Articles, the Court would have decreed an Estate-tail to him; yet if the Father, by the Consent and Approbation of the Trustees, had made such a Settlement, this Court would never set it aside.

But in that Case the Father had done it by his Last Will, without the Consent of the Trustees, and without the Consent of the Son, who was then of Age, and by that Means the Son, having no Power to make a Jointure, or any Charge on the Lands, to make Provision for the younger Children, that Devise was set aside.

But in the Principal Case, the Settlement in 1692. was made by the Confent of the Trustees in the first Settlement, which is therefore good, and a full Execution of the Covenant in that Settlement.

And so is Mathews's Case, who by his Father's Marriage Articles, was made Tenant in Tail; but some Time afterwards the Father made a Settlement, by which Mathews was made Tenant for Life, with a Power to set-

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tle a Jointure of 600 l. a Year, on any Wo man he should marry; and being about to marry, it was the Opinion of feveral eminent Lawyers, he could make no greater Jointure; for the' he was Tenant in Tail by the Articles; and if it rested there, he might have made what Jointure he thought fit, yet being Tenant for Life, by fublequent Settlement varying from the Articles, he could not make the Join ture beyond 600 l. per Annum, and thereupon he applied to the Parliament and obtained an Act to make up the Jointure 1000l. per Annum, but the his Estate in Possession, and all the Re mainders over, should continue as be fore.

Next, the Counsel for the Plaints cited the Case of Burton against Hasings, in this Court, which was thus (viz.) By the Marriage Articles the Wife's Estate was to be settled on the Husband and Wife, and on the Heir of their two Bodies to be begotten, and afterwards it was settled to the Use of the Husband and Wife, during their Lives, Remainder to the first and every other Son of the Husband in Tal Male, Remainder to the Heirs of the Body of the Wife; they had no Son and but one Daughter, the Husband died, and the Widow married again,

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and then the Husband and Wife joined in a Fine, and fettled the Estate to other Uses; thereupon the Daughter exhibited her Bill, and prayed Relief on the Articles; because by the Equity thereof, the Husband and Wife ought to be but Tenants for Life, and the fubfequent Settlement could not enlarge the Estate of the Wife to an Estatetail general, (viz.) to her and the Heirs of her Body; but she had no Relief; the Lord Chancellor Cowper declaring he could not relieve against the Settlement, tho' if it rested on the Articles, without any Settlement made, he would have decreed that the Articles should be carried into Execution.

It was further infifted for the Plaintiff, that he was proper in this Application, and had Reason to pray the Aid of this Court; and for that Purpose a Case was cited between Sir Richard Mead and the Lord Kerry, which was thus, (viz.) The late Lord Kerry, in Consideration of a Marriage and a Marriage Portion, settled his Estate to the U/e of himself for Life, then to Trustees to preserve contingent Remainders, then to his first and every other Son, in Tail Male, Gc. and before he had any Issue, he borrowed Money of the Plaintiff; and for fecuring the Repayment thereof, with

with Interest, he levied a Fine, Ga and upon a special Verdict found in the Cause, the Question was if the Charge was good against the present Lord, for that on his Father's levying the Fine, the Trustees did not enter to preferve the contingent Remainders; fo that it is very proper that the Plaintiff in the Principal Cafe should come into this Court to compel the Trustees to enter, in order to preserve the contingent Remainders, especially since the Plaintiff is a Purchaser under the Settlement made 1692. for that his Father, who made that Settlement, had thereby abridg'd his Power of Charging the Estate with 1000 l. per Annum, which by the Settlement made Anno 1673. he had Power to do.

Curia.

Every Remainder Man hath a Right to come into this Court, and pray the Aid thereof, to compel Persons to bring in the Deeds and Evidences relating to the Estate; but this is a Bill of the first Impression, as to the Prayer; for the Trustees to enter to preserve contingent Remainders; for their Title is meerly at Law, neither doth it appear in Cause that the Trustees resuled to enter.

Now, if this Case is considered upon the Deed made Anno 1673. the Defendant fend there i692 was ment venar which Tena Liber Land there

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ed upon ne De fendant fendant is Tenant in Tail of the Lands thereby settled; but the Deed made 1692. of the new purchased Lands, was intended to be a Family Settlement, and a full Execution of the Covenant in the Deed, made 1673. by which Deed the Defendant being made Tenant for Life, he shall not be at Liberty to incumber any Part of the Lands thereby settled by his Father; therefore the Decree was for the Plaintiff.

And in pronouncing this Decree, the Lord Chancellor said, that where a Settlement is made by the Father, or other lineal Ancestor, in Consideration of the Marriage of his Son, in such Case all the Remainders limited to his Children and their Posterity, are within the Consideration of that Settlement; but when it is made by a Brother, or any other collateral Ancestor, on his Marriage, after the Limitations to his own Issue, all the Remainders limited to his Collateral Kindred are voluntary, and not within the Consideration of the Marriage Settlement.

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Clane

### Hane against his Father, Lord Barnard.

Trin. 7 Annæ, in Chancery; Chancellor Cowper.

THE Lord Barnard, for the Advancement of the Plaintiff, a younger Son, in Marriage, Sir—

Folliff's Daughter enters into Articles with Sir—Folliff, to this Effect:

Folliff covenants and agrees, inter alia, to fettle Lands free from Incumbrances, according to the usual Limitations in Marriage-Settlements; and in Confideration thereof, the Lord B. covenants and agrees to fettle Lands, by the Name of the Value of 2000 l. per Annum, (but with a Life or two upon them) upon Trustees, to like Uses; but with these Words, That in such Settlement there shall be Covenants that he is seised in Fee, has good Right to convey, and that the Trustees shall enjoy, free from Incumbrances. It happen'd that these Lands were charged by Lord B. own Marriage-Settlement, with 6500 to be paid to fuch Daughter or Daugh ters, as should be living at my Lords Death, and not provided for.

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The Bill was to have a specifick Performance of the Articles, by my Lord's paying off, or otherwise giving collateral Security against this contingent Portion of 6500 l. he having then one Daughter about Sixteen Years old. was urged for the Plaintiff, that it was usual for this Court to decree a specifick Performance of Articles and Covenants, and not to depend only upon the uncertain Reparation of Damages which the personal Estate may perhaps not be able to fatisfy; and this was not controverted where it was poffible to be done. But the Lord Chancellor held, that here was not any Covenant that the Lands were free from Incumbrances, but only a Covenant that he would, in the Settlement (which was after to be executed) covenant for that Purpose; so that the Parties feem'd to be fatisfied with a bare Covenant only; and the Marriage-Articles were only a Covenant to covenant; fo that inferting that Covehant in the future Settlements, was a specifick Performance of those Articles; and was all that my Lord agreed to do, or that the Plaintiff, by his Bill, defir'd to have.

My Lord Chancellor faid, Notice or Notice of this Incumbrance was

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very material in this Case; for a Covenant is in this Manner: If any Incumbrance is discover'd between the Executing the Articles and Sealing the Deed of Settlement, whereof the Party had no Notice, that Incumbrance shall be discharg'd, even before Sealing the Deed of Settlement, both upon Account of the Fraud, in concealing such Incumbrance; and because it would be needless to enter into a Covenant, which before entering into it is already known to be broke. But against all other Incumbrances discovered afterwards, there is the Parties Covenant Now where you have Notice of an Incumbrance, before executing the Articles, it is a stronger Case than the last; for you covenant with your Eyes open, to accept the Parties Covenant against an Incumbrance you were aware of; and when you have chosen your Method of Security your felf, this Court will give you no other, nor make the Party do a farther Act than by the Articles he has agreed to do; and the rather in this Case, for that the Portion it not a certain Incumbrance, but a contingent one; and therefore it is reafonable to suppose, that my Lord Barnard would not be compell'd to charge his remaining Estate, at all Hazards,

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to secure against an Incumbrance that was but contingent, to the Prejudice of his eldest Son, especially when he had provided for the younger Son fo plentifully. And decreed that my Lord B. should execute a Decd of Settlement, with Covenants exactly purfuant to the Articles only. But because the Estate was subject to a present Charge, viz. to the Payment of a yearly Sum for the Daughter's Maintenance, from her Birth; that the Lord B. should pay and discharge all Arrears of that and the growing Annuity, as it shall arise, taking Acquittances from his Daughter, and leaving them with the Plaintiff for his Security.

It was strongly urged by Mr. Vernon, That supposing these Articles were but a Covenant to covenant, yet as soon as the Articles were perform'd, by sealing the Deed of Settlement, then they might come the next Day and exhibit their Bill to enforce an Execution, specifically of the Covenant in such Deed of Settlement; and why may not the Court decree that to be done now, as well as that which after the Performance of this Decree, they will immediately decree upon a new Bill.

Lord Chancellor said, in this Case, they could not; for the Incumbrance

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was

was not necessary, but contingent; and if you brought an Action at Law upon fuch a Covenant, you should not recover Two-pence Damages, 'till a Breach, which possibly may never happen. Befides the Covenant in the Deed of Settlement, is not to be that the Estate is free from Incumbrances, but that the Trustees shall enjoy free from Incumbrances; which fo long as they do, the Covenant is not broke; and it feems the Portion being contingent, and not certain, was the Reason of this Part of the Decree, because it is plain, by the latter Part of the Decree, where the Incumbrance was certain (viz. the Payment of a certain Sum) the Lord B. was decreed immediately to discharge it; tho' by the Articles he did but Covenant to Covenant, as is aforefaid; and there is no other Difference between those two Matters, in controverting the Point of Notice in this Case. It appear'd that Sir Edward Northey was employ'd as Counsel by the Plaintiff; and Folia had Notice, as he owned, but after wards, he not being able to dispatch it fast enough, the Matter was taken out of his Hands, and one Sir --- was employ'd, who drew the Writing, and finish'd the Matter, and no Proof was made, that he had any Notice of this Incum-

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incumbrance; whereupon the Question was, Whether Notice to a Counsel, or Agent, that is once employ'd, and goes not through with the Business, shall be Notice to the Party himself? for it was allow'd on all Hands, that if he goes through Notice to Counsel, Attorney, Scrivener, or any other Agent, it is sufficient Notice to the Party himself.

The Chancellor was in Doubt, but another Proof of Notice being accidentally discover'd, this Matter was not determin'd; for it appears that in these Articles, Notice was taken of my Lady B's Jointure in these very Lands, which necessarily leads to the Deed, whereby that Jointure is made; and in that Deed there was this Portion charged upon the Lands, and whatever is conwhich any tained in a Deed to other necessarily leads you, you, are prefumed to know, which was allow'd, without a Word more.

Note the Difference between a prefent Covenant, that Lands are free from Incumbrance, and that a Man shall execute a Deed, with a Covenant that the Lands are free,

And between a Covenant that Lands are free, and that the Trustees shall enjoy the Lands free.

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If a Man devises 1500l. to A. and B. for such Uses as the Testator had declar'd to them, and by them not to be disclosed, and he discloses the Trust to A. who by Letter discloses it to B. this shall be a Trust, and the Letter is a good Declaration thereof, tho either or both the Trustees be dead. Trin. 1689. between Crooke and Brooking. 2 Vern. 106.

But if a Man devises Forty Pounds to be paid to his Cousin J. S. and by him to be disposed of in such Manner as the Testator should by a private Note acquaint him with, and dies without having made any such Appointment, this shall be a good Request to J. S. and shall not go to the Executors, from whom it was intended to have been given away. I Chan. Cases 198.

If an Impropriator devises to one that served the Cure, and to all that should serve the Cure after him, all the Tithes and other Prosits, &c. tho the Curate is incapable of Taking by this Devise, in such Manner, for want of being Incorporate, and having Succession, yet the Heir of the Devisee shall be seised in Trust for the Curate for the Time being. 2 Vent. 349. decreed by Finch Lord Chancellor.

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A. lent B. 1001. and in the Note which was given, Mention was made that it should be disposed of as A. should direct, on a Bill exhibited for it; the Court declared it was a Depositum, or Trust, and decreed Payment of it, tho' it was barred by the Statute of Limitations. 2 Ven. 345.

If A. in Consideration of Eighty Pounds, conveys an Estate absolutely to B. and afterwards A. brings a Bill to redeem, and B. by Answer, insists that the Conveyance was absolute; but confesses that after the Eighty Pounds paid, with Interest, it was to be in Trust for the Wife and Children of A. and A. replies to the Answer, though there be no other Proof of the Trust, yet it will be decreed for the Wife and Children. Pasch. 1693. between Hampton and Spencer. 2 Vern. 288, 289.

So if J. S. makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother, by telling her, &c. to get J. S. to make a new Will, and name him Executor therein, he promising to be a Trustee for the Mother, which is done accordingly; and in that Will there is but a small Legacy given the Wife, this will be decreed a Trust for the Wife, on the Point of Fraud, notwithstanding the Statute of Frauds

and

and Perjuries. Hill. 1684. between Thun and Thun. 1 Vern. 296.

If a Man purchases Lands in another's Name, and pays the Money, it will be a Trust for him that paid the Money, tho' there be no Deed made, declaring the Trust thereof; for the Statute of Frauds and Perjuries extends not to Trusts raised by Operation of Law.

2 Vent. 361. 1 Vern. 366. S. P. admitted; but there said that the Proof must be very clear that he paid the Purchase-Money.

If there are three Lesses of a Church, and one of them surrenders the old Lease, and takes a new Lease in his own Name, it shall be a Trust for all Mich. 1684. between Palmer and Young.

1 Vern. 276. per Curiam.

A. and B. agreed together to take a Lease of a Colliery for less than three Years, for which they contracted at a certain Rent; but by the Agreement, the Lease was taken in A.'s Name only, tho' at the Time of the executing there of, the Lessor insisted that B. should be a Joint Lessee with A. and should receive a Moiety of the Profits, and be answerable for a Moiety of the Rent, and refused to let it on any other Terms, and accordingly demanded and received a Moiety of the Rent from

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B. on a Bill brought by B. A. pleaded the Statute of Frauds and Perjuries, and that there was no Declaration of a Trust in Writing, B. insisted that it was good, being a Leafe for less than three Years; or if his Title was not good on that Account, yet it was good, as a resulting Trust; as to the first, the Court held, that tho' a Lease for three Years may be good by Parol, yet when fuch a Lease is made in Writing, the Trust of that Lease cannot be declar'd by Parol; and as to the fecond, ordered the Plea to stand for an Answer; the Judge who fate in my Lord Chancellor's Absence, being in Doubt about it, tho' he inclin'd to over-rule the Plea. Mich. 1682. between Riddle and Emeron. 1 Vern. 108.

A.'s Father had executed a Grant of the next Avoidance of a Church, to B. the Defendant's Father, who was a Clergyman, and a Person much intrufled and employed by him, and the Grantee knew nothing of the making of this Grant; and being examin'd in a Cause, had deposed that he did not purchase it; and it was held that this was a refulting Trust to the Grantor, there being no other Trust declared. Hill. 1697. between the Duke of Nor-

folk and Brown.

But

But if the Mortgagee assigns over his Mortgage to J. S. and declares a Trust thereof by Parol, for A. and B. only, it shall prevent a resulting Trust to the Assignor; for the Statute of Frands, which saves resulting Trusts, extends only to such as were resulting Trusts before the Statute, and a bare Declaration by Parol, before the Act would prevent any resulting Trust. Trin. 1693. between Lady Bellassis and Compton. 2 Vern. 294. but no Decree.

If a Father purchase Lands in the Name of his eldest Son, this shall be an Advancement for the Son, and not a Trust for the Father, though the Father has been in Possession of it, and has received the Rents and Prosits thereof. Hill. 28 Car. 2. between Lord Gray and Lady Gray, 1 Chan. Cases 296. 1 Chan. Cases 27. S. P. 2 Chan. Cases 231. S. P. and there said to be the

constant Rule.

So where the Lord of a West-Country Manor, his Tenants refusing to renew, made a Lease to his Daughter, for Ninety-nine Years, and afterwards sold the Estate to J. S. who had Notice of the Lease, and took a collateral Security that the Daughter should release within Four Years after she attained her Age of Twenty-one Years;

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and though it was infifted that this was Trust for the Father; and that it was the usual Method that Lords of West-Country Manors took, when the Tenant in Possession refused to renew; yet my Lord Chancellor held it no Trust for the Father, but an Advancement for his Child; and that the Purchaser having purchas'd with Notice of it, and taking a Collateral Security, he must make the best of his Security. Trin. 1687. between Fennings and Selleck. I Vern.

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So if a Father purchases a Copyhold Tenement, in the Name of his eldest Son, an Infant of about Eleven Years old, and lays out 400% in Improvements, pays the Purchase-Money, and all the Fines, and enjoys it, during his Life, but having furrendered it to the Use of his Will, devises it to his Wife for Life, and after to his younger Children, who were otherwise unprovided for, and the eldest Son recovers in Ejeament, the Wife and Children cannot be relieved against it; for the Purchase shall be consider'd as an Advancement for the Son, and not a Trust for the Father, tho' he enjoyed it during his Life; for the Son was but an Infant at the Time of the Purchase. Pasch. 1687. Mumma and Mumma. 2 Vern.

2 Vern. 19. 2 Vern. 28. S. P. docreed.

A Man bought Copyhold Lands of the Nature of Borough English, in the Name of his eldest Son, but there was no Declaration of Trust in Writing but the Plaintiff would have had it a Trust; for the Father, who as well as the Eldest, were both dead; it was agreed the Father paid the Purchase Money, and many Witnesses were examin'd on both Sides. And Acts of Ownership, as Receipts of Rents, Repairs, Gc. prov'd in both Father and Son; fo that the Proofs, as to the Matter, feem'd to be pretty equal; but there being no Declaration in Writing that it was a Trust for the Father, the Court decreed it an Advancement for the Son, which was affirm'd in the House of Lords. Trin. 1701. between Shales and Shales.

So if a Father purchases in his eldest Son's Name, and the Son is put into Possession, who afterwards falls sick and in his Sickness the Father gets him to seal a Deed, declaring his Name was made use of only in Trust for him and the Son recovers and continues in Possession, and marries, after his Decease his Wife shall be endow'd, not withstanding this Declaration of Trust; and

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and though the Father had got a Conveyance of the legal Estate from the younger Son; for this is a Secret and fraudulent Deed of Trust, to deceive Creditors and Purchasers. Pasch. 1702. between Bateman and Bateman. 2 Vern. 436.

If the Grandfather takes Bonds; in the Name of his Grandchildren, the Father being dead, this shall be an Advancement for the Grand Children, and not a Trust for the Grandfather; for the Father being dead, the Children are under the immediate Care of the Grandfather. Pasch. 32 Car. 2. between Ebrand and Dancer. 2 Chan. Cases 26.

If Lands are devised to Trustees and their Heirs, in Trust for a Feme Covert, and that the Trustees shall from Time to Time pay and dispose of the Rents and Profits to the faid Feme Covert, or to fuch Perfons as she, whether Sole or Covert shall appoint; and that her Husband shall have no Benefit thereof; and as to the Inheritance in Trust to such Persons as she by Will, or other Writing, under her Hand should appoint; and for Want of fuch Appointment to her and her Heirs, this shall be a Trust, and not an Use executed by the Statute. Mich. 1686. between

tween Nevil and Saunders. 1 Vern.

415.

But where a Man devised the Rents and Profits of certain Lands to T. B. the Wife of W. B. during her Natural Life, to be paid by his Executors, into her own Hands, without the Intermedling of her Husband; and after her Decease he devised them to others; and it was held by Rokeby and Eyre, Justices, that the Lands themselves belong'd to the Wife, against Holt Chief Justice, who held strongly that the Executors were only Trustees for the Wife, Between South and Allen. 1 Salk. 228.

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## TREATISE

OF

# Dower.

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A CTIONS relating to Estates for Life, concern either Estates in Dower, or other Estates for Life.

First, relating to Estates in Dower; and they are either Droitural or Possesfory.

- of Dower, concerning the Quarentine.
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#### Df Dower.

- 1. The Writ of Dower, unde nihil habet.
- 2. The Writ of Admeasurement of Dower.
- 3. The Writ De dote assignanda. Secondly, Actions relating to Estates for Life, as a Writ of Quod ei deforciat.

First, Df the Wirit of Right of Dower.

What Dower is. The Dower is the Provision which the Law makes for the Wife, after the Decease of the Husband; and in (a) Socage Tenure, it was originally Half during the Widowhood, because whatsoever was got during the Coverture, was supposed to be by the joint Industry of them both; but Half only during the Widowhood, because it was not to be carried away from that Family into

another:

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<sup>(</sup>a) Socage Tenure is the Condition upon which Tenants held their Lands, to plow the Land of their Lords, with their own Ploughs, and do other inferiour Services of Husbandry, at their own Charge. This flavish Tenure hath, by the Agreement of Lords and Tenants, been turned into the Payment of a yearly Sum, which is called Free Socage, in Contradiftination to the other Tenure, which was called Villanum Socagium. Brack. lib. 2. c. 35. Co. Lit. 117.

<sup>(</sup>a) Kr nure, wh held to t Service in lief; but Car. c. 2 (b) Th

another: So in (a) Knight-Service it was aThird; one Third being allow'd for the Performance of the Service, and the other two Thirds were to be divided between the Wife and the Heir; and here the Wife was to hold during her Life; for they consider'd it here, not as an Acquisition that was to go back into the former Husband's Family, if she married another; but as a Tenure that was to continue, according to the Form of the Infeudation, which was during Life; and therefore look'd on the Marriage Contract for an Infeudation after the Death of the Husband; not only in every Manner which he should have during the Time of the Coverture; but fince the Marriage was only a Contract for fuch (b) Infeudation, it

(a) Knight-Service, or Servitium militare, was a Tenure, whereby several Lands in this Kingdom were held to the King, which drew after it Homage and Service in War, Escuage, Ward, Marriage and Relief; but it is now taken away by the Statute of 12 Car. c. 24.

(b) This Word Infeudation, is a Term borrowed from the Civil Law, which fignifies (according to the Civilians) the Granting Lands, Honours or Fees, either to a Man, during the Will of his Lord or Sovereign, or for the Feudary's own Life, or to him and his Heirs for ever, upon this Condition, that he and his Heirs acknowledge the Donor, and his Heirs to be heir Lord and Sovereign, and bear Faith to him and his Heirs, for the faid Tenure, and do such Services as was covenanted between them, and proper to a Feud.

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was not actually made until the Heir had affigned which was the Completion of Hence it was that the Infeudation. the Assignment was by the Heir, where all other Infeudations were made coram paribus Curia; therefore the Heir made the Assignment, as Lord of the Manor, who was to create the Tenure; but if there was any Dispute, touching the Quantity, it was determinable by the (a) Pares. If they did not like the Determination, the Wife might remove it to the County-Court, and fo to the King's Court; and the Heir immediately to the King's Court; to avoid Delay to the Wife, it was fet out by Way of Metes and Bounds, because it was a Tenancy of the Heir, and therefore like all other Lands in Tenure, was to be separated from the Demesnes of the Manor; the Infeudation defeated the Descent; because by the Marriage Contract, the Tenure was to take Place on the Death of the Husband; fo only two Thirds can be supposed to descend in

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<sup>(</sup>a) This word Pares signifies Men of the like Condition in Life, and under the same Law, who were called to the King's Court, the County-Court, of Court-Baron, to Judge of Matters in Dispute, between their Fellow Countrymen, that were under the same Jurisdiction. Spelman's Gloss. 448.

<sup>(</sup>a) The Statute in might grandled of he tute begin rum & I Dominorum

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Demesne to the Heir; since in the other Third a Tenure is created in the Wife to hold of the Heir immediately from the Death of the Ancestor; and the Reason why the Law created this as a Tenure was, that the Heir might be obliged to do the Service for it, during the Time of its Continuance, as he was obliged to do for all Lands which he had given out in Tenure, as well as those he held in Demesne; and had there been no Tenure it had been cut off from the Manor, during the Life of the Wife, when the Heir was a Tenant and no Lord of the Manor; the Affignment of Dower was in the Nature of Subinfeudation; and this Tenure continues after the Statute of (a) Quia Emptores terrarum, fince the Heir does not part with the Fee.

The Writ of Right of Dower is Pa-That it is tent, and shall be directed unto the A Writ Heir, to sue in the Court of the Heir,

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<sup>(</sup>a) The Statute of Quia Emptores Terrarum, is a Statute made in the 18th of E. I. whereby none might grant Lands or Tenements in Fee-simple, to hold of himself, and is so called, because the Statute begins with these Words, Quia Emptores Terrarum & Tenementorum de feodis magnatum aliorum Dominorum in prejudicium eorundem, Sc. Terras Tementa sua vendiderunt tenendum in feodum sibi; so that these Words, and what followed, shew the Cause of making that Statute. 2 Inst. 500. 1 Inst. 98. b.

as it appeareth by Britton; and where the Writ is directed to the Heir of the Husband, and the same Heir is seised of the Land whereof the Wife demanded Dower; then if he will not affign Dower unto the Feme, the Feme, who is Demandant, may remove the same by a (a) Tolt, into the County-Court; and also may remove the same out of the County-Court into the Common Pleas, by a (b) Pone, without fliewing any Caufe in the Writ, as the Demandant shall do in a Writ of Right Patent; but the Tenant in a Writ of remove the Right Patent, shall not remove the Plea out of the County-Court into the Common Pleas, without shewing Cause in the Pone; and the Tenant in a Writ of Right Patent, or in a Writ of Dower, may remove the Plea into the Com-

That the Wife may Plaint. That the Tenant cannet, without Praving Cause.

> (a) A Tolt is a Writ whereby a Cause depending in a Court-Baron, is remov'd into the County-Court and is so called, because thereby Lis tollitur e Curia Baronis & ad Curiam vicecomitis defertur.

> (b) This Writ is called a Pone, only from the Mandatory Part of the Writ, which is, if the Party make the Sheriff secure that he will prosecute his Claim against the Defendant, the Sheriff is commanded to compel the Defendant to give Security to answer the the Plaintiff's Complaint by the Words tune pone per vadios & salvos plegios (the Defendant): And it is for the Demandant in Dower to remove the Cause into the Court of Common Pleas. See New Nat. Brev

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mon Pleas, by a (a) Recordare out of Where it the Court of the Lord, upon Cause may be Recorshewed in the Writ; and what Gauses dare. are fufficient, and good to remove the Lord's Plea out of the Court, or out of the Country, and what not, does appear in the Register; and therefore see the Cases there; but the Demandant could not done by a remove the Plea out of the Court of Pone, but the Heir, by a Pone, because he ought by a Tolt. first to remove it by a Tolt into the County-Court, and from the County-Court he may remove it into the Common Pleas, by a Pone, without shewing the Cause in the Writ, as before is faid.

Since the Dowress holds of the Heir, To whom as the Heir holds over of the Lord; the the Writ is Writ of Right of Dower is directed to red the Heir, who, upon that Writ, may affign Dower, without any further Contest; and if the Heir be Lord of the Manor of which the Wife is to be endowed, then the Assignment is to be by

(a) Recordare is a Writ directed to the Sheriff to remove a Cause depending in an inferior Court, to the King's Bench or Common Pleas; and is fo called by these Words of the Writ, The Judge of the inferior Court, is commanded to make a Record of the Proceedings in the County-Court, and transmit the Cause into the King's Superior Court of Record. New Nat. Brev. S. A. 16. E.

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the Heir, with the Approbation of the Pares Curia; but if the Heir be only Tenant, and not Lord of a Manor, then the Assignment cannot be in the Court-Baron of which the Tenant holds, because the Writ is not directed to that Lord, to give him Authority to proceed; for the Writ of Right was only where the great Controversy happen'd between the immediate Feudaries of the Manor; and the Dowress is Tenant to the Heir, and not to the Lord; therefore the Writ cannot come into the Court-Baron, unless where she is to be endowed of the Manor itself, or where the Lord is Guardian in Chilvalry to the Infant, then the Writ shall be directed to the Lord to endow her; and this is an Act done by the Lord, as Guardian to the Infant, and as annexed unto the Estate, which falls into the Lord's Hands, during the Minority of the Infant; but in that Case, if the Infant had an Estate in Socage-Tenure, whereof the Wife might endow herfelf, that was an Endowment (a) De la pluis Beale. If

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<sup>(</sup>a) Dower de la piuis Beale, is that Kind of Dower, which is neither of the other Kinds of Dower, oil Dower at the Common Law, Dower by the Custom,

If the Heir, or Lord of the Manor, Where would not endow the Feme, she may have a have a Tolt into the Sheriff's Court, Tole without any Cause shewn, because it Writ of Right, 11, was in her own Delay, and where the 12. Heir had no Court, unless she acquiesced in the Endowment made by him, her only Remedy was to remove it by Tolt immediately; and where the Lord was Guardian in Chivalry, and refused to endow, because she might have Dower de la pluis Beale into whatever Court the Cause was removed, he might plead fuch Title to Dower in the Wife, in Bar of his Affignment, because the Lord was not obliged to divide his own Feud, the Wife having otherwise a sufficient Dower to sustain

And in a Writ of Right Patent, the Where the Plea may be removed at the Tenant's Plea to be removed by

Dower ad oftium Ecclesia, or Ex affensu patris, but is therefore contradiftinguished from them by this Appellation, De la pluis Beale, so called, because where there are Lands held by Knight-Service, and some by Socage Tenure, of which the Husband died seised, the Guardian in Chivalry may pray that the Wife may be endowed De la pluis Beale, i. e. of the most Fair of the Lands held by the Socage-Tenure, according to the Value of the Third Part, which she claims of those Lands held by Knight Service; and the Reason 18, because this Knight-Service is for Defence of the Realm, and therefore it is pro bono publico, that fuch Service do remain intire, and ought to be favoured. Co. Lit. 39. 6.

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Suit, by a Recordate out of the Lord's Court into the Common Pleas, before the Justices there; and by the same Reason, it seemeth, it may be removed at the Suit of the Tenant, in a Writ of Right of Dower, out of the Heir's Court into the Common Pleas, before the Justices there, by a Recordare, for good Cause; sed Quare.

12 Aff. Pl. 20. Where the Writ to be the Feoffee.

And if the Husband do enfeoff a Stranger of all his Lands, and dies, and his Heirs have nothing by Descent; now directed to if the Feme be to fue forth a Writ of Right of Dower, it feemeth that she shall sue her Writ of Right of Dower, directed to the Feoffee; for after the Endowment, the Feoffee shall be her Lord, and she shall hold the Dower of him, by Fealty; but before the Statute of Quia Emptores, &c. if the Husband enfeoff a Stranger of Parcel of his Lands, to hold of him; then if the Feme be to fue a Writ of Right of Dower against the Feoffee, the Writ shall be fued in the Heir's Court, and Where to directed to the Heir, for the Seigniory the Heir. that remaineth in him.

And so if the Husband, at this Day, giveth Parcel of his Manor in Tail, to hold of him, and dieth, the Feme shall fue her Writ of Right of Dower, in the Court of the Heir of her Husband,

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and against the Donee in Tail, and the The like. Writ shall be directed to the Heir.

But if the Husband makes a Gift in Tail, of all the Lands that he hath, and dies, and the Feme is to sue a Writ of Right of Dower of that Land, then Where the her Husband's Heir cannot have any against the Court, because he hath but a Seigniory Donee, diin gross; and therefore it stands with rested to the She. Reason, that she should have her Writ riff. of Dower against the Donee in Tail, directed to the Sherist, returnable in the Common Pleas; and she shall have this Clause in the Writ, Quia B. capitalis Dominus feodi illius nobis inde remisit Curiam suam.

Dower is the Consequence of the That Marriage Contract, which was underthe Confestood, that the Wife should have the quence of Third Part of the Estate, the Husband the Marwas seised of, during the Coverture, to sustain herself and younger Children, during her Life, because she was supposed to be equally concerned in the Acquisition. In Knight-Service, she had For what a Third, because one Third was allowed. In the Acquisition of the extraordinary Burthen of the Tenant, and one Third for sustaining the Heir; so she always equally divided with him; but the Heir was alvided with him; but the Heir was al-

ways to fet it out; and she was not to carve for herself, because the Wife

To whom to a p'y for ber Dower.

held of the Husband's Representative; as interior to the Husband, and confequently as subject in Tenure to the Hir, who represented him; but if the Hir did not fet out according to E. quality in his Court, she might apply to the County-Court, and to the King's Court, and where the Heir had no Court, she may enter a Dominus remisit Curiam suam; and hereby the Writ of Right of Dower was returnable into the King's Court; but if the Heir had a Feudal Court, she might have had it there fet out; and then it was either affigned, and fet out by the Heir himself, or by his Pares; for this was an Act that he himself might do, as well as his Pares in that Court, because it was prefumed that he would

· How it the Statute Quia Terrarum.

100 before rather be more Beneficent to his Mother, than act according to the strict En tores Division required by Law; and this Power continued to the Heir, as long as the Tenure continued; fo that he had a Power over the Lands, as a Feudal Lord, before the Statute Quia Emp tores, Gc.

And if the Husband aliened the Lands to hold of himself, since the Feoffee continued Feudatory to the Hufband, the Heir was to affign Dower in his Court; but fince the Statute, the

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Feoffee holds of the superior Lord; Where the therefore the Heir remits his Court ; be brought. and the Writ of Right of Dower is to be brought in the King's Court by the Dominus remisit Curiam suam; but the Tenant in Tail or for Life, Gc. did after the Statute hold of the Lord; and therefore the Heir's Affignment of Dower continues.

And so if the Husband makes a Where the Lease of all his Lands unto a Stranger Dower to for Life, and dieth, and the Feme is to have the bring a Writ of Dower against the Writ a-Lessee, for Life, then it seems reason- Lessee for able, that the Feme have her Writ of Life. Right of Dower against the Lessee for Life in the Common Pleas; because that he in the Reversion hath not any

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And altho' that this Clause, Quia Where the B. capitalis D'nus, &c. be put into the Writmaybe Writ, the Lord has not any Court to in the Comhold, because it is a Seigniory in Gross, mon Pleas, and not any Demesne Land to hold a Clause Court, Gc. and then altho' the Lord Quia Cadid never remit his Court, and that pitalis Dominus there is not any Matter apparent re-be not in maining in the Chancery, to prove the Writ. the Lord's Will, or Assignment, to remit his Court; yet the Writ returned into the Common Pleas, before the Juflices there, is good; and they shall proceed

proceed thereupon; if the Lord hath not any Court to hold Pleas of this Matter.

And the Lord to bave no Action for Suing the Writ tbere.

And it feems, that the Lord shall not have his Action against the Demandant, for fuing the Writ in the Common Pleas, if he hath got no Court to hold Plea thereupon, and to do Right unto the Party.

Where he tion.

But if the Lord hath a Court to may bave hold Plea, then he may have a Prohibition to the Justices of the Common Pleas, that they do not proceed upon the Plea, otherwise not. Quære de hoc.

Where a Dominus remifit Curiam fnam, is implied.

When the Husband, being Lord, aliens Lands to hold of the fupream Lord, of Consequence they are no more Attendant to his Court; and therefore there is implied a Dominus remisit Curiam suam; so that no Action lies for the Heir, for bringing the Writ into the King's Court, fince the Anceftor remitted his Court, by fuch Alienation; and no Action lies by the Mesne Lord; because the Title of the Wife begins before the Tenure arose to him; for the Wife's Title arises from the Seisin of the Husband, which was preceding the Alienation, whereby the Alience is attendant upon the next Lord, and by Confequence, the Court

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is remitted to the Crown by Alienation.

And this Writ of Right of Dower, Where a lieth where a Feme is endowed of Par-Wife is cel of her Dower, and she would de-of Part of mand the Residue against the same ber Dower, Tenant, and in the same Town; then have her she ought to sue this Writ of Dower; Writ of for the Words of the other, viz. unde Right of mihil habet, will not serve, because that she hath received Part of her Dower; and therefore, of Necessity, it behoves her to sue this Writ of Right of Dower, to recover the Residue; and the Writ shall be directed to the Heir, or to his Guardian, if he be in Ward, as a Writ of Right Patent shall be, Gc.

The Reason of this is, because the And the Possessiony Writ, as the Writ Unde nil Reason thereof. habet is, must demand the whole Dower of the whole Estate of the Husband; and that Possessiony Writ she can have but once; therefore if she omits out of the Writ of Unde nil habet any of the Lands which the Husband was seifed of, during the Coverture, she is put to her Writ of Right of Dower quoad Where a the Lands.

And if a Feme loses her Land which Default, the holds in Dower by Default in a she may Pracipe quod reddat; yet, according Writ of to the Opinion of some Men, she shall Right of have Dower.

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have a Writ of Right of Dower; but it feems by the Equity of the Statutos of West. 2. c. 4. That if a Feme lose, by Default, the Land whereof she hath had Dower, that by that Statute she may have a Quod ei Deforciat, to recover that Land; and before the Statute, she had no Remedy to recover the Land, but only in an Action of Disceit, if the were not summoned.

Tenant for Life, barred in Action, could not bave a Writ at Common Law.

At Common Law, if Tenant for Life was barred in the Peffeffory Action, he a Possession never could have the Action Droitural; but if he was barred of his Seisin, as he was in the Possessory Action, he was Droitural barred of his Right for ever; and the Reason is, because no Body could have a final Judgment to Perpetuity, to put the Lands in Peace, by the very Tenant, or Tenant in Fee-simple of those Lands, and that bound the Right for ever against all Persons, even against all Strangers that did not Claim within the Year and Day; but Tenant for Life of Lands, claims the Seisin only, therefore whatever barred the Seisin, was a Bar to their Right, fince they had not a meer Right, distinct from the Seisin; and therefore, if even the Tenant in Dower was barred by Default, in a Writ of Dower, Unde nihil habet, the was perfectly barred thereby, because

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tause the Bar to her Seisin was a Bar to her Right; but if the Lands were omitted in the Writ of Dower unde nihil habet, the Judgment in the Writ could be no Bar quoad the Dower in those Lands, because the Judgment was not concerning the same; but as to the Lands mentioned in the Writ, Judgment by Default was a Bar, 'till helped by the Statute of West. 2. c. 4. which gives the Quod ei Deforciat.

And if the Feme hath Dower, and Feme lose the same by Assize, or Action losing her tried, it seems she hath no Remedy but Dower by Assize, ber by Attaint; for it seems she shall have Remedy is no Remedy to recover by a Writ of Attaint. Right of Dower, because she had the Land once assigned to her in Dower; and she was in Possession of the same; so that the Title was executed, and so she ought to sue an Action of her own Possession, if she be afterwards deforced.

For the Statute extends only to E- The Reaflates for Life, or in Dower, where the fon. Tenants lose by Default, and not where they are barred by Judgment, upon the Merits of their Cause.

And after the Plea removed into the The Pro-Common Pleas, the Process is then a ress after Grand Cape, and a Petit Cape; and in the Heir's Court, the Manner is to make a

Bb Process

De Dower.

Process in the Nature of a Summons, and of a Grand and Petit Cape; and the

Writ to the Heir is thus,

REX A. Salutem. Pracip. tibi quod TheForm sine dilatione plenum rectum teneas B. of the que fuit uxor C. de tertia parte decem Writ. acr. terra cum pertinent. in W. quam clamat tenere de te in dote per liberum servitium tertiæ partis uniús denarii per Annum, pro omni servitio qued ei de-

forciat, Gc.

And also a Feme may have a Writ Dower of of Right of Dower of the Moiety, aca Moiety. cording to the Usage of Gavelkind, where she hath received Part, and is

deforced of Part.

And also it appeareth in the Regi-Where directed to fter, that the Feme shall have a Writ the Heir. of Right of Dower directed unto the Heir himself, where he himself de-

forceth her of the Profits of an Office, and the Writ is thus,

REX A. salutem. Præcip. tibi quod The Form of the plenum rectum teneas B. de tertia parte Writ of exituum provenientium de Custodia Gaola Dower, Abbatia Westm. & de tertia parte trium to the Heir for the third Rodarum terra unius Roda prati, & redditus tot per Annum & lagenarum Part. cervisia vel tot ferculorum per Diem vel per septimanam vel per Annum cum

pertinentiis in villa Westm. quas clamat pertinere ad liberum tenementum

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fuum quod de te tenet in dote G tenere clamat de te in liberum servitium inveniendum tibi tertiam partem Custod. pro Custodia Gaola pradict. G porta ejusd. Abbatia pro omni servitio quod ipsa desorciat, Gc. Vide 15 Ed. 3. Dower 81.

Dower demanded of the Profits com- The Proing from a Fair de N. 11 El. 3. Dow. fits of a 85. C. Lit. 32. Dower is demandable of the Moiety of Stallage, coming from the Fair of D. and good, without saying the Moiety of the Profits of Stallage, for Stallage is a Profit. Ra. Ent. of Stal-234. De tertia parte exit. & profic. lage. de quodam mercato quolibet anno in festo. S. Mich. 12 Ed. 3. Dower may be well demanded of the Third Part of the of an Profits of a Bailiss's Office, Parker, Office. Gc. without demanding the Third Part of the Office, because entire; dubitatur in the Office of F. v. 45 Ed. 3. Dower 50. where the Feme is endow'd of the Third Part of the Profits of a Of a Mill. Mill, and had the Freehold of the Vide Stat. Title Third Part of the Mill in her. 21 Ed.3. Dower, 51. Dower, of the Third Part of the Pl. 3 H.5. Office of the Marshalsea.

And by the Writ it appeareth, that what is the Feme shall have a Writ of Dower appendant of what is appendant, or appurtenant and appurtenant,

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to the Land which she holdeth in Dower, if she be deforced thereof.

Df a Mrit De Quarentina Habenda.

The Writ rentina Habenda, when it lies.

The Writ of Quarentina Habenda, De Qua- lieth where a Man dieth feised of a Messuage and Lands, and immediately after the Death of the Husband, the Heir, or he who ought to have the Lands after his Death, will put the Wife out of the Messuage, &c. then the Wife will have this Writ; for by the Statute of Magna Charta, cap. 7. the Wife shall remain in the Capital Mesfuage after the Death of the Husband, forty Days, if it be not a Caftle, and that Writ is Vicountiel, and shall be direced to the Sheriff, and he shall hold Plea thereof.

That it is a Writ Vicountiel. By what Statute

given.

This Writ was given by the Statute of Magna Charta, c. 7. and therefore the Statute is recited in the Writ; and it was for the Time which the Wife was to continue in the Husband's House, and until the had got an Affignment of her Dower; and that the unnatural Heirs should not turn her out immediately; therefore the Writ is Vicountiel, that the Sheriff might restore her; in Case she was put out before the forty Days were ended.

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### And the Writ is in this Form,

REX vicecomiti salutem, or, ballivis The Form suis Salut. Ex querela B. que fuit uxor Writ. D. accepinus quod cum in Magna Charta de libertatibus Anglia continetur, quod vidua maneant in capitali Messuagio maritorum suorum per dies 40. nisi Messuag. illud castr. sit, infra quod tempus dotes sua assignentur eisdem, & quod interim habeant rationabilia estoveria de bonis eorundem, J. de C. ipsam B. statim post mortem prædict. viri sui, de capitali Messuag. quod fuit ejusdem D. in H. licet nec castrum sit, nec dos ei assignata fuerit, violenter ejecit, o ipsa estoveria sua de bouis ejusd. D. percipere non permittit, ad ipsiûs B. damnum non modicum & gravamen, & contra tenorem charte prædicta, & quia prafat. B. injuriari nolumns in hac parte vobis pracipiums, quod vocatis coram vobis partibus prædict. & auditis hinc & inde earum rationibus eidem B. plenam & celerem justitiam inde fieri faciatis juxta tenorem charta pradicta, ne pro defectu justitia querela ad nos venerit, Teste, Crc.

And upon that Writ, the Sheriff shall award Process against the Party, to Bb3 come

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come and answer the same, and shall not stay until the County-Court be holden; for this Writ is a Commission to him, and upon the same he shall immediately make Process to answer, Gc. within two or three Days, according to his Direction; and thereupon to proceed as Justices should do in a Commission of Oyer and Terminer, &c.

#### Domer unde nihil Habet.

A Writ of Dower unde niwhere it lies.

A Writ of Dower unde nihil habet, lieth in Case where a Woman taketh hil Habet, a Husband who is sole seised of Lands or Tenements, to him and his Heirs, in Fee-simple, or to him and the Heirs of his Body; or if the Husband, during his Marriage, be folely feifed in Fecfimple, or Fee-tail of fuch Estate, that the Issue begot between him and his Wife, may inherit the same; then if the Husband doth alien the same, or dieth feifed thereof, or be diffeifed and dieth, his Wife shall have a Writ of Dower unde nihil habet, against him who is Tenant of the Freehold of the Land, or against him who is Guardian by Knight-Service of the Land.

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## And the Form of the Writ is thus,

REX vic. salem. Mandamus vobis The Forms quod juste & sine dilatione redd. B. que of the fuit uxor C. rationabilem dotem suam, Latin. qua ei contingit de ténemento quod suit pradict. C. quondam viri sui in N. unde nil habet, ut dicit, & unde queritur quod A. ei deforciat, & nisi, &c.

Note; Altho' the Writ be conditional, nist fecerit, tunc summoneas, yet bound to the Demandant is not bound to accept the Tender in pais; for then the Tender of should lose her Damages for the Time past; nor is the Tenant bound to tender it there; and yet he may plead in the Common Pleas, touts temps prist. 11 H.4.

It is plain the Wife cannot have Da-From what mages but from the Time of her De-Time the mand, because the Tenant of the Land dant to cannot set out the Dower, 'till the have Da-Feme be there to accept it; and therefore when the Writ of Dower comes to him, he is not bound to set out the Dower; because the Dowres is not with the Sheriff to accept it: Indeed, if she comes with the Sheriff, it will make a Demand in pais, from thence Bb4

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to recover her Damages in the same be was al- Manner as if she had made her Reways rea- quest before the Writ brought; but if the has not made fuch Demand in pais, the Defendant may plead touts temps prist, fince, as it is faid, he is intitled to the Profits, 'till Default; but he cannot plead touts temps prift, against her after an Essoin cast; because by that, his Delay appears on Record.

> And against the Guardian the Writ is thus,

The Form of the Writ a-Guardian.

Pracipe A. custod. terra J. quod reddat, &c. B. que fuit uxor D. &c. gainst the 9 H. 5. 4. Note 13 Ed. 3. Brev. 242. if he be Guardian of the Land and Body, he ought to be named fo in the Writ; otherwise it shall abate. 18 Ed.2. Brev. 832.

That he is dian.

Because if the Dowress do not name med Guar- him Guardian of both in the Writ, she does not intitle herself to the Action against him; for he is not to set out Dower for her, but as Guardian of the Infant.

Ought to shew the Heir was Heir to bim laft feifed.

And note; She ought to make him Heir by the Writ to him that was last seised. 11 Ed. 3. Brev. 471. because if the Writ be brought against the Heir of of she the not fro

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of the Assignee of the Husband, unless she shews that the Tenant is Heir to the Person that was last seised, she does not intitle herself to an Assignment from him.

Otherwise where she is endowed ad oftium Ecclesia, it is thus,

Præcipe A. quod redd. B. quæ fuit Prætipe of uxor C. cent. acr. terræ, cum pertin. Dower ad oftium In N. de quibus prædict. C. quondam Ecclesia. vir ipsiûs B. eam dotavit ad ostium Ecclesia, quando eam desponsavit, unde nil habet, &c.

And if she be endowed De assensu patris, then thus,

Pracipe A. quod reddat B. qua fuit Ex affenunor C. cent. acr. terra, &c. de quibus fu patris, pradict. & filius & hares ipsius A. quondam viri ipsius B. de assensu & voluntate ipsius A. patris sui, eam dotavit ad ost. Ecclesia, unde, &c.

And the Writ of Dower unde nihil Dower habet, may be fued in the County be-hil habet, fore the Sheriff, by a Justicies, and a may be Wife shall be endowed of an Advow-sued be-son, Villains, Commons, &c. and of Sheriff by other Profits and Liberties of which a Justi-her Husband had any Estate of Inheritance,

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tance, which Estate the Issue, betwixt them, by Possibility, may inherit, &c.

And the Wife may fue a Writ of Lands or Tenements in London; and the Writ shall be directed to the Mayor and Sheriffs of London, and it shall be fuch :

Præcipe to the Sheriffs of Londan.

REX majori & vic. Lond. Sal. Pracip. vobis quod Justiciatis A. quod juste & sine dilatione & secund. consuet' civ. nostra Lond. redd. B. qua fuit uxor C. rationabilem dotem suam que ei contigit &c. in Lond. & Justiciatis D. quod juste, &c. & Secundum, &c. reddat eidem B. rationabilem &c. in eadem civitate unde nihil habet, &c. ut dicit, Gc. & unde queritur quod prædict. A. & D. ei deforciant, ne amplius, &c. Teste, Gc.

Dower in mants.

And by that it appears, that a Woagainst se- man shall have a Writ of Dower in weral Te- London against several Tenants by a feveral Justicies in the Writ, as well as she shall have the Writ of Dower against feveral Tenants by several Pracipe's, and all in one Writ, and the Process is Summons, Grand and Petit Cape, in the Common Pleas.

A. brought

A. brought Dower against B. de li- One care hero tenemento in C. & D. B. appear- not base ed; and before Plaint made, the brought of Dower another Writ in the same Vill; this unde nirit of Writ shall abate, though no Plaint at one and was made before; for by Shard, one the same hall not have two Writs of Dower the latter unde nihil habet, against the same Te- shall abate. nant, in the same Vill, if it be not upon Special Matter; as if the Tenant purchase other Lands, after the first Writ, whereof she is dowable. 11 E.3. Brev. 476. Otherwise it is of an Assize.

> 39 H. 6. 12. The Writ of Dower being returnable Where before Justiciariis resident. the first there may Writ is depending at the Time of the Writ. fecond Writ purchased; and therefore it may be pleaded in Bar thereof, if they both relate to the fame Lands; but in the Case of the Asize, if the first never be returnable before the Just. itinerant. the Commission is at an End; and a fecond Writ may be brought at the next Assizes, since the first can-

not be faid to be pending.

#### Of Admeasurement of Dower.

The Writ of Admeasurement of Dow- Writ of er lieth where the Heir, when he is Admeawithin Age, endoweth the Wife of more furement of Dower than lieth.

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Who may bage it.

than she ought to have Dower of, or if the Guardian endoweth the Wife of more than of a Third Part of the Land of which she ought to have Dower, then the Heir at full Age may fue this Writ against the Wife; and thereby she shall be admeasured, and the Surplufage she had in Dower, shall be restored to the Heir; but in such Case, there shall not be assigned a-new any Lands to hold in Dower, but to take from her fo much of the Lands as furpasseth the Third Part whereof she ought to be endowed; and he need not fet forth of whose Assignment she holds. 17 Ed.3. 66, a View is not grantable on this Writ 17 Ed. 3 67. cont. adjudg'd, 78 E. 3. 20. and it feems that the Heir within Age, shall have an Admeasurement of Dower of his own Affignment. 7 E. 3. Admeasurement B. but if the Heir, at full Age, assigns Dower, he shall not have this Writ against his own Assign-

The Heir within Age.

Where the Heir at full Age shall not.

Where the Guardian to the Heir shall bave the Writ.

ment. 6 H. 3. Admeasurement 18.

And if the Heir within Age, before the Guardian enters into the Land, do assign to the Wife more Land in Dower than she ought to have, then the Guardian shall have the Writ of Admeasurement against the Wife, by the Statute of West. 2. c. 7. and if the Guardian brings the Writ, and does pursue it against the Wife, yet the Heir at his stull

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been a Th full Age, by the same Statute, shall have the Writ of Admeasurement of Dower against the Wife.

And the Writ is Vicountiel, and shall be fued in the County before the She-

riff, and is thus:

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REX vicecomiti salutem. Questus est The Form nobis A. filius & hares B. quod C. qua thereof. fuit uxor prædict. B. plus habet in dotem de libero tenemento quod fuit præditt. B. quon dam viri sui, in N. quam here debet, & ad ipsam pertinet habend. ideo tibi præcip. quod juste, &c. admensurari facias dotem illam, ita quod præditt. C. non habeat plus in dotem de hæred. præditt. A. quam habere debet & ad ipsam pertinet habendum secundum rationabilem dotem suam, & prædictus A habet de dote illa id quod h'ere debet & ad ipsam pertinet habendum ne amplius, Gc. Teste, Gc.

The Writ of Admeasurement lieth Where it upon the Affignment of Dower by the it lieth Heir, within Age, or his Guardian; upon an because any Act of such Heir cannot of Dower, intitle her to more than is due by the by the Law; and by Consequence a Writ of Heir or Guardian. Admeasurement must lie, and there was no View in this Writ; because it proceeded on a Supposition, that it had been viewed, and found to be more than Third Part; and therefore to have allowed

allowed a View afterwards, in order to

fee fuch an Error, was to suppose that the Writ had originally no Foundation; and it was Vicountiel, because it was prefumed the first Assignment was in the Court of the Heir; and if there was any Mistake there, it was to be rectified in the Court of the Sheriff. Vide 13 E.3. Admeasurement 17. Yet Bratton

Iusticiariis.

Vicoun-

tiel.

Where it is fays, if the hath Lands in Dower in divers Countries, there it ought to be coram Justiciariis; and note, there the Tenant shall have several Writs.

All the Land to be named.

So note first, In every Writ of Admeasurement, all the Land which he hath in the fame County, shall be nam'd and admeafur'd.

Where there are to be feveval Writs.

Secondly, If he hath Lands in several Counties, there shall be several Writs and feveral Extents of the whole Land, whereof the Party died feised; and it feems he may have one Count and one Admeasurement. Quære how it shall be made. 13 Ed. 4. Admeasurement 17. yet note 7 R. 2. ibid. 4. the Defendant was put to answer, notwithstanding this Exception.

The Reafon why the Writ is to be coram Ju-

The Reason why the Writs must be coram Fusticiariis, where the Lands are in feveral Counties, is, because the Sheriffs of two Counties cannot fet out a perfect Dower; for they cannot meet

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out of their Cities, in order to do it; and the Dower might have been Right in the whole, though it was out of Proportion in one of the Counties; therefore there is no correcting Dower fet forth in two Counties, nor confidering it whether just or not, but only by considering it coram Justiciariis; but the Tenants must have several Writs, because an Inquest must be taken before the Justices in several Counties; but tho' there be several Writs, yet the Count must be upon them all, because the Question before the Court, is touching the Affignment of the Dower, which is one entire Thing; and therefore the Judgment must be of the Affignment upon all the Writs, tho' the Inquest must be several upon each of them. It feems the Inquests must be taken in every County, where the Defendant is dowable, of how much more or less than a Third is assigned in every County; and upon comparing all the Inquests returned, the Fustices are to give Judgment, that the Heir should recover those Acres that were over affigned, and by the Confequence of that Judgment, the Defendant will hold the rest as a reasonable Dower.

And, it seems, that in the Count the Conclu-Conclusion is, Et inde producit sectam, sion of the Count must be. Count of Admensurationem &c. as in the Count of Admeasurement of Pasture; and if the Dowress can plead nothing in Bar of the Admeasurement, her Manner of pleading is, Venit & Defendit

How the the Downess is to plead.

The award of the Writ.

admensurationem præd. sieri, &c. ideo præceptum est vic. (of the several Counties) quod assumptis secum 12 lib. & legal. hominibus, &c. per quos, &c. qui nec, &c. in propria persona sua accedant ad prædictam terram admensurandam, & quod per eorum sacrum admensurari faciant terram illam, ita quod prædict. Defend. nil h'eat in illa plus in dotem, quam ad ipsam pertinet habendum, secundum dotabilem dotem suam, & admensurationem quam, &c. Scire facias hic tali die sub sigillo, &c. sigillis, &c.

When the Writ is returned, it is en-

tered up in this Manner,

PER quod pradictus vic. adtunc & How the Enibidem admensurari fecerit terr. illam, try is to be, when tam per discretionem suam, quam per sacr'um 12 prob. & legalium hominum ad the Writ is returnhoc jurat. qui dicunt super sacramentum ed. suum, quod in villa de H. x. acræ terra sunt assignata prad' Defend. plus quam illa habere debet, & plus quam ad ipsam pertinet habendum secundum rationabilem dotem fuam, and then the Judgment is, Quod (the Heir) recuperet x. acras terra pradictas. And

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And where the Lands are in several Several Counties, there are several Inquests, and inquests one entire Judgment, for the Number of the overplus Acres are contained in all the Inquests. Rastall's Entries, Admeasurement de Past. fol. 23.

And for the Guardian, the Writ is

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idgt x. And Questus est nobis A. Custos terra & ha-Writ for red. C. quod B. qua fuit uxor pradict. the Guarden plus habet in dotem ipsius, &c. ita quod non habeat plus in dotem; &c. &c. quod pradict. Custos habeat, &c. ne amplius, &c. Teste, &c.

And when the Plea is in the Coun-When the ty, the Plaintiff may remove it with-Plaintiff out any Cause set forth in the Writ; to remove and the Defendant may likewise re-without move it without any Cause in the Writ, setting forth a Reason.

And if the Writ be removed into The Prothe Common Pleas, by a Pone, and by whom Process be awarded against the Defenthe Addants, according to the Statute, which measure is Summons, Attachment and Distress, ment to be Admeasurement, but to extend all the Lands; particularly, and to return the same into the Common Pleas; and

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# Of Dower.

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made by the Justices.

And if the Guardian assign for Dower to the Wife, more than she ought to have, and afterwards grants over his Estate, his Assignee shall not have a Writ of Admeasurement. Note these Points following are well refolved.

First, If the Guardian assign Dower. Where the Grantee to and grants over the Ward, the Grantes have the Writ.

shall not have Admeasurement.

Where the Heir, and not the Guardian to have it.

Secondly, If the Ancestor assigns Dower, and dies, the Guardian of his Hein shall never have Admeasurement, but his Heir shall have it; but this seems to be in Case where the Ancestor was within Age at the Time of the Affign ment.

Where the Guardian Shall have

Where the

Age.

Thirdly, Where the King feifes Ward, to which he hath no Right, the Guardian sues an Ouster le main, and has it, salva dote, it feems, in this Cafe the Guardian shall have Admeasure ment; otherwise it is of the Assigne or Grantee of the King. 7 R. 2. Ad measurement 4. Note there also, if the Disseisor endow the Wife of more that

Heir Shall have an Affife. a Third Part, the Heir shall have a The Reafon why the Grantee may bave

Affife. The Reason is, because the Grante it, and not comes in under the Guardian, and there at his full fore is bound by his Acts; but if the He nall be

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be of full Age, and affigns Dower, and dies, his Heir shall have no Writ of Admeasurement, tho' he assigned too much, because he is bound by the Act of his Ancestor; but if the Heir be of the Heir within Age, and affigns Dower, and be within dies, his Heir being of full Age, he the Age. hall have a Writ of Admeasurement, because his Ancestor was not bound by his Act, during the Minority; but if the Heir be within Age, when he affigns Dower, and dies, leaving an Heir within Age, fuch Heir shall have an Admeasurement when he comes of full Age, when he may be thereby bound; and the Guardian shall not have thereby a new Admeasurement during the Minority, because he must take the Eflate in the Condition the Ancestor left it, tho' fuch Assignment of the Ancestor was to the Prejudice of the Guardian.

And if the Disselfor endows the Wife whether of more than a Third Part, the Heir shall have an Assise, because he had no an Assise. Right to assign Dower, and therefore the Wife does not come in under a Person who had Power to make an Assignment, quoad that Part which is more than her Dower; so that in that, she is looked upon as a Disselfor; and by Consequence the Heir may have an Assignment, quoad that Part which is more than her Dower; so that in that, she is looked upon as a Disselfor; and by Consequence the Heir may have an Assignment.

And

Cc 2

Where the Guardian shall bave a Writ of Admea -Surement of Dower,

Affignee.

And so if the Heir, within Age, as figns to the Wife more in Dower than she ought to have, &c. the Guardian in Right may have a Writ of Admen surement; but if he Grants over his E but not his state, his Assignee, who is Guardian in Fact, shall not have the Writ, because it was a Thing in Action given to him and the Heir shall have a Writ of Ad measurement of Dower for Dower at figned in the Time of his Ancestor hoc videtur, if the Ancestor was within Age at the Time, &c.

Where the Heir fhall bave the Writ; and the Tenant no Remedy by Affife, but by Scire facias.

And if a Woman be endowed in Chancery by the King, the Heir shall have a Writ of Admeasurement again her, if the has more affigned unto he for Dower than she ought to have. upon Recovery of the Third Part i Dower, the Sheriff assigns a Moiety the Tenant hath no Remedy again the Sheriff by Affife, but he may hav a Scire facias to assign Dower de nov 23 R. 2. Execution, 165. Vide 21 A 7. 29.

Dower not to be avoided by Entry.

Dower affigned by the Infant, mor than was necessary, shall not be avoi ed by Entry. Vide 10 Ed. 3. 21. Do er shall not be admeasured by a Wi of Dower. 19 Ed. 3. Quare Imped 154. T

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The Reason is, when the Feme re- Where the covers Dower, and the Sheriff assigns it construed by Award of the Court, and by the In- no Wrongquest of twelve Men, the Sheriff is no doer, and the Heir Wrong-doer, tho' he affigns more than can bave her Share, fo that the Heir can have no Affife. no Affife against him, but he must apoly himself to the Court for a new inquest; and therefore must call in the The Te-Tenant in Dower, by Scire facias. nant to be And when the Heir assigns, during his called in Minority, more than is necessary, he facias. cannot, at his full Age, avoid it by Entry, because Part is well assigned, ince she was intitled to some Dower. and confequently he cannot avoid, but quoad the Overplus, and fuch Overplus cannot be distinguished till it be ad-

meafured. Secondly, This Affignment was fup- An Affignposed to be done with the Approba-ment of tion of the Pares of the Heir's Court, supposed to and fo could not be avoided without be done an Inquest; but if the Wife brings a per Pares, Writ of Dower, and the Dower be fet avoided out under the Direction of the Court, but by Inquest. the Heir shall not have Admeasurement when he comes of full Age, because it is supposed the Court will take Care of the Interest of the Infant; therefore its Act cannot be impeached, tho' the Wife had thereby more than Cc3 fhe

by a Scire

Whether the Heir may bave a Scire facias, notwith-Randing

she ought; but Quere whether the Heir may not have a Scire facias, if the Sheriff has fet out more than he ought; and if the Guardian do affign Dower more than she ought to have, an Inquest the Heir, during his Nonage, shall not have a Writ of Admeasurement; but if he himself does, &c. then it seems reafonable that he himself, during his Nonage, may have the Writ of Admeasure-Quere tamen. ment of Dower.

Improvement of in Dower, measurement.

But if the Wife, after the Affignment the Tenant of Dower, do improve the Land, and make it better than it was at the Time taken from of the Assignment, an Admeasurement ber by Ad- does not lie of that Improvement. 14 H. 3. Admeasurement 10. 13 E. 1. ibid. 17. but if the Improvement be by Cafualty, as a Mine of Coals, or of Lead, which are in the Land, &c. which have been occupied in the Hufband's Time, the Doubt is the more; but she shall not dig new Mines, for that would be Waste.

A Diffevence taken, as to Several Sorts of Improvements. 5 Co. fol. 12.

The Distinction, touching the Mine, feems to be this, That where a Mine is not open, she cannot work it at all, because it will be Waste; if it be open, and in Work, it feems to be only a cafual Profit; and a casual Profit shall not avoid an Affignment, or be fo admeasured as to vacate it, fince it is

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fo ade it is not certain to continue during the Life of the *Dowress*; and therefore not to be computed into the Value of that Part which she possesses, unless the Value was coextensive with the Estate which she is to have in it.

And if the Ancestor dieth seised, and Where the Husband die before he entereth in-endowed, to the Land, yet the Wife shall be en-tho' the dowed, tho' her Husband had but a Husband had no Possession in Law.

But a Man shall not be Tenant Aliter of by the Curtesy of Land, if the Wife a Tenant had not a Possession in Deed, if it be tesy. not in Special Cases, as of an Advow-son, of Rent, where she dies before the Day of Payment.

And in that Case, if the King's Tenant die seised, and the Ter-tenant dies before he enters, then the Wife shall be endowed.

But if the Heir enters and intrudes Where the upon the King's Possession, and after-Wise not wards dies before he sueth his Livery, to be enwards dies before he sueth his Livery, dowed the Wife shall not be endowed by the where the Statute of Prarog. Reg. c. 12. which Heir intrudes upon is, that if the Heir intrude upon the the King's King's Possession, that nullum accrescit Possession. ei lib. tenementum. Where a Woman takes a Lease for Years of Land, she shall not be endowed of the same Land, during the Term; accordingly

Cc4 where

Of Dower.

Where the Wife to be endow-Husband be attainrestored.

where the Wife takes the Commitment of the Wardship from the Grant of the 'ed, tho' the King, without any Execution of Dower, the shall be barred of Dower, during red, if the the Nonage of the Heir. 6 H.4.7. But if the Baron be attainted, and dies, and the Wife takes a Lease for Years of the Land, from the Grant of the King, the Heir of the Husband being also in Ward of the King for other Tenements that were intailed; and afterwards by Act of Parliament, or Repeal of Judgment, the Heir is restor'd, now she Thall have her Dower; for that the Lease was made before the Title of Dower commenced. So if A. makes a Leafe to a Feme for Years, and afterwards they intermarry, A. dies within the Term, his Wife shall be endowed. 6 H. 4. 7. 8. Sir John Cornwallis's Cafe. Dyer 76. Tenant at Will shall be in Dower of the same Lands.

The Reafon thereof.

The Reason of this Case is, because when the Wife takes a Term, or has a Term in the Land, by her own Act, she agrees to hold it under the Refervation of the Rent; therefore she cannot afterwards recover a Freehold in that Estate, which would make a Merger of the Term, quead that third Part; and by Confequence take away the Security which the Heir had for his Rent, fines

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ince he could not afterwards distrain Where the in that third Part for his Rent, and centance therefore such Term will be a Bar to of a Term the Wise's recovering Dower in that shall bar her Dower. Land, since she has covenanted with Aliter the Heir to hold of him in another of the Ac-Manner; but though the Wise were a Tenancy Tenant at Will, she may bring Dower, at Will. because the bringing the Writ is a Determination of the Will. And where the Estate, which the Husband hath during the Marriage, is ended, there the Wife shall lose her Dower.

As if Tenant in Tail do discontinue Where the wife shall in Fee, and afterwards taketh a Wife, lose her and disseiseth the Dicontinuee, or the Dower by Discontinuee doth enseoff him, and af-a Discontinue terwards the Tenant in Tail dieth sei- 1 Inst. 31. sed, his Heir is remitted, and the Wife Dyer 41. shall lose her Dower, because the Heir is seised of another Estate of Inheritance than the Husband had during

the Coverture. Vide infra.

And so if a Man have a Title of Ac-Where the tion to recover any Land, and after-Wise shall lose her wards he entereth and disseiseth the Dower, the Tenant of the Land, and dieth seised, Husband and his Heir entereth, his Heir is re-Disseiser. mitted unto the Title which his Ancestor had, and the Husband's Wise shall lose her Dower, for the Estate which the Husband had is determined;

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Extinct.

for that was an Estate in Fee by Wrong, and the Heir hath the Estate in Fee, which his Ancestor had by Right. According to this Diversity.

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Vide 10 Ed. 3. 27.

If a Man makes a Gift in Tail, re-Where the Wife of the ferving a Rent to him and his Heirs, and afterwards the Donor hath a Wife, be endowed and dieth, and the Tenant in Tail dieth of a Rent, without Issue, the Wife of the Donor shall not be endow'd of the Rent, because the Rent is extinct; for it was referved upon the Estate-tail, which is ended; but altho' that the Tenant in Tail dieth without Issue, yet his Wife shall be endowed, because the Land continueth, and is not determined, as the Rent is. N. B. If a Rent be granted to 7. S.

Where the bave Dower of a ceffet executio Nonage of the Heir. Where the Wife of the Father mall not er of the

Grand-

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third Part.

Wife Shall and his Heirs, upon Condition that if the Grantee or his Heirs be within Age, Rent, but the Rent shall cease during their Nonage, the Wife shall recover Dower of during the the Rent against the Ter-tenant; but cesset executio during the Nonage. 12 E. 3. Condition, Perkins fol.65. Pl.277. If the Grandfather dies feised, and after the Father dies seised, and the

Son hath the Land, and then the Wife bave Dow of the Grandfather is endowed of the third Part of the Land, and dieth, yet the Wife of the Father shall not have Dower of the third Part. Quia dos de The dote peti non debet.

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The Dowrels holds of the Heir; but by the Institution of the Law, she is in of the Estate of her Husband; to that after the Heir's Affignment, the holds by an Infeudation from the immediate Death of the Husband: Hence it is that Dower defeats Descent, be-Where cause the Lands cannot be said to de-feats Descend as Demesne, which are in Te-scent. nure, and the Affignment of Dower being in Nature of Infeudation, and taking Place immediately from the Death of the Husband, there are only two Thirds which descended as Demesne: Hence the Maxim arose that there could not be Dos ex dote; for if Where Dos can-there were Grandfather, Father and Son, not be ex Gc. ut supra, the Mother was not in- doce. titled to be endowed of a third Part of that Third, because it was in Tenure of the Grandmother, during the Life of the Father, and he was never feifed of it.

But if the Grandmother had died, Where the during the Life of the Father, the Mother shall be Mother should be endowed; because endowed. the Tenure of the Dowress's Grandmother was determined, and so was Demesne in the Life of the Father.

So if the Grandfather had enfeoffed the Father, and died, and the Grandmother had recover'd Dower of the Father.

The like of that Part which mother, beld in Dewer.

Father, and then the Father died, the Mether should be endowed, not only of the the Grand- Estate in Possession, but of one Third in Reversion, of that Part (viz.) which the Grandmother held in Dower, because the actual Seisin of the Father, by the Feoffment, was before the Tenure of the Grandmother took Place upon the Estate, tho' the Title to such Tenure was precedent; therefore the Title of the Grandmother does not avoid the Seisin of the Father, which he attain'd by the precedent Livery, but only burthens it with an Estate for Life; so that the Seisin of the Father, in this Case, being not defeated by the Tenure of the Grandmother, as it was in the former Case, such Seisin must therefore be esteem'd to have Continuance during the Coverture; and from this Notion it is clear, that if Tenant in Tail discontinues, and after takes a Where the Wife, and disseises the Discontinuee, and dies, his Wife shall not be endow'd, because her Tenure must arise out of the Estate gained by Disseisin, and by Consequence, such Tenure is defeated by the Remitter; for she cannot hold of the Heir, as by Infeudation of that Estate which he has not in him.

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If the Husband be Tenant in Common, with two others in Fee, of certain

Wife of the Difeifor of the Discontinuee shall not be endowed.

tain Lands, and dies, his Wife shall How the be endowed of the third Part of the Wife of Tenant Land, by Metes and Bounds to hold in in Common Common, &c. it is to be holden by to be en-Metes and Bounds, quoad the Heir, and fhe must stock the Land in Proportion to a Third of a Moiety; and quoad the other Moiety, she must still hold in Common with the other Tenants.

Dower must always be in Severalty Dower by by Metes and Bounds, quoud the Heir; Metes and Bounds. because it is a Tenure of the Heir, and therefore must be divided from his De-

mefnes.

And if a Wife be endow'd of a Mill, How to be or of an Office, she shall have the third endowed of a Mill, or Part of the Profits thereof assigned to an Office. her, and she shall have a Freehold in the third Part of the Mill, Gc. M. 45. E. 3. A Woman at the Age of Nine Years, or more, at the Death of her Husband, shall have Dower of his Land; but if she be of less Age, &c. then she shall have no Dower.

If a Woman be endow'd, and after Tenant in loseth it by an Action tried, if she prays Dower, in Aid of him in the Reversion, she Aid of him shall be endow'd of that which remain-in Revereth. Vide 4 E. 3. 25, 36. 10 E. 3. 7. 10 be enyet there feems this Diversity, if a dowed. Wife be endow'd by a Disseisor, she shall have the Warranty; but if the

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Reversion of those Lands be only granted over by the Heir, she hath lost the Warranty against the Grantee. 17 E. 3. 7. 21 E. 3. 48. 10 E. 3. Quid juris, 41.

Dower of in Exchange.

If the Husband exchangeth Lands, Lands beld &c. and afterwards dieth, if the Wife have Dower of the third Part of the Land taken in exchange, she shall not have Dower of the other Lands, &c. which were given in Exchange.

Where a Stranger may plead She holds Lands in Socage.

If a Woman be Guardian in Socage, and the brings a Writ of Dower against a Stranger, he may plead that she holdeth Lands in Socage, of which she may endow herself de la pluis Beale, and then upon that the Wife may endow herfelf of those Lands, unto the Value of the third Part, which she ought to have of the other Lands which the Guardian holdeth, &c.

Whether She may endow ber-Self of Lands de la pluis Bealc.

And whether she may endow herfelf de la pluis Beale, unto the Value of the third Part, which she ought to have of all her Husband's Lands or no, Quare. For some hold that Dower de la pluis Beale shall endure but during the Minority of the Heir which is in Ward.

Where the Son cannot endow ex affenfu patris.

The Son would have endow'd his Wife of a Reversion of Land, which one held for Life, ex assensu patris, and

and held not good, M. 4. E. 3. because it was not in Possession, whereof a Right of Dower may be claimed.

And the Writ of Dower ex affensu Where patris lies as well against the Guardian that Writ as against the Tenant of the Free-

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If the Tenant fore-judge the Mesne, Where the yet the Mesne's Wife shall be endow'd. Wife of If a Man recovers in Value against the the Mesne Husband, by a Warranty ancestrel, yet be endowthe Wife shall be endow'd, because ed. the same is by Force of the Warranty made, and not by Reason of a paramount Title to the Land.

Where the Husband's Lands are evic- Where the ted by a Title Paramount, the Wife Wife cancannot be endow'd, because the Wife not be encannot be intitled to an Infeudation, Lands where the Husband is not intitled to evided by the Land itself; but if Land be re- Paracover'd by Way of Recompence in Va-mount. lue, either by Homage ancestrel, or otherwise, such Recompence binds the Land only from the Judgment of fuch Land being precedently bound. By the Where the Wife's Title to her Dower, she shall shall bave have her Dower out of the Lands re- of Lands cover'd in Value; and if the Wife be recovered evicted in any Part of those Lands af- in Value. figned unto her for her Dower, she is intitled to recover in Value against the Assignor

d his which patris, and

Not against the Heir's Grantee.

Assignor of Dower, be he Disseisor of Heir; because it was not an Infeudation of that Third to which she was intitled; but she shall not recover against the Heir's Grantee of the Residue of the Lands, because he did not make the Infeudation, and the Tenure is not in him, but the Reversion still continucs in the Heir; and albeit, the Heir had granted the Reversion of the third Part, yet she could not recover against the Grantee, because the Heir could not grant over the Reversion, without her Attornment; and she is not oblig'd to attorn, unless fuch Grantee of the Reversion will enter into a Warranty to defend her Estate; and it seems that the Recompence which the Wife has; is only against the Person who made the Affignment of Dower, and doth not touch any Estate not subject to such The younger Son shall Intendation. not assign Dower to his Wife, ex assensu patris of the Father's Land, because no Heir apparent.

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Dower
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Patris.

The Endowment ad oftium Ecclesia; or, ex assensu Patris, are particular Inscudations in the Life of the Husband, though to take Place after his Decease, and therefore the Uise may enter without any Assignment of the Heir, or any further Specification of

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the Father, than what was contain'd in his original Deed; because the Tenure was erected in the Life of the Husband; and none can endow in this Manner, but the Heir apparent; because no Body else can be certainly intitled to the Demesne, and therefore they cannot make fuch Sort of Infeudation out of them, nor could the Heir do it, without the Assent of the Father; because the Demesnes are in him, nor could the younger Son even in Borough English do it, because there may Co. Lie. be a younger; and these Sort of Dow-35. b. ers were so constituted as to take Place Purpose at all Events, either in the Life of constituted. the Father, by his Assent, or after his Death by the Infeudation of the Husband.

If the Husband enters into Religion, A Wife the Wife shall not have Dower, during not to bave his Life; for the entering into Religion is only a Separation, and no Diferil Death solution of the Marriage; and if he of the were deraigned, he may enter upon his and why. Estate again; and it seems the Ecclematical Law will give the Wife Alimony, during his Life; but she cannot have a separate Interest, by Way of Dower, during the Marriage.

The Wife shall have the Third Part of an Advowson for her Dower: If

Dd the

May lose the Wife do elope from her Husband, ber Dower and remain with the Adulterer, she fhall lofe her Dower. tery.

But if the remain in Adultery, upon But not if The is upon the Husband's Lands or Tenements, the Land. she shall have Dower, because the

fame is not an Elopement.

How the Old Law food when. Villenage was in Use.

By the old Fendal Law, the Vaffal, if he committed Adultery with his Lord's Wife, it was a Forfeit of his Feud, and confequently if the Wife of a Tenant committed Adultery, she forfeited the Infeudation of her Dower; but the subsequent Laws put it upon Elopement; because by that the Adultery became flagrant, and they would not allow fecret Adulteries to be pretended after the Death of the Husband, by which the Heir blemish'd the Reputation of his Ancestor.

If the Husband be attainted of Fe-How she might lose lony by Outlawry, or otherwise, she shall ber Dower lose her Dower. Vide the Common before the Law was Law alter'd in this Cafe. 1 E. 6. c. altered.

1 E. 6.

When the Husband's Estate escheatc. 12, 9, 17. ed to the Lord for Felony, or to the Co. Lit. 9, 55. 44 King for Treason, there was an End of the Wife's Dower, because the King or Lord came in by Title Paramount, and the Estate of the Husband was at an End, out of which the Infeudation was to

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to be; so if the Husband had enfeoffed When she any Person, and had committed Trea-could not fon or Felony, the could not have Dower of claimed her Dower from the Feoffee, the Feoffee. because the Feoffee after the Death of the Husband, held of the fuperior Lord; and the Estate of the Husband, which he had during the Coverture, is forfeited; but if the Husband had not committed the Treason or Felony, then she might have claim'd her Dower of the Feoffee, tho' fince the Statute of Quia Emptores, the Feoffee holds of How the the superior Lord, because the Mar-fince the riage is considered as a Charge upon the Statute Estate to any Person that comes in the Emptores Per; as under the Conveyance of Terrathe Husband, and therefore the Wife's rum, Dower was confider'd as an Infeudation charged on the Estate of the Feoffor; but if the Husband had committed a Forfeiture after Feoffment, it would have work'd as an Escheat of the Mesnalty, and confequently the Feoffee would have held of the Lord Paramount; and the Wife could not therefore have had Dower; but where there was no Forfeiture, the Mesnalty had a Continuance, and then the Wife's Dower was to charge the Feoffee, as a prior Infeudation arising out of the Marriage Contract.

Dd2

But

The like.

But after the Statute of Quia Emptores, &c. this Distinction, which arose out of the Mesne Tenure, became obsolete; and therefore they thought, since the Husband could not by his Alienation, defeat the Wise's Dower, so neither ought he by his Act of Forseiture; therefore, agreeable to this, the Statute of 1 E. 6. c. 12. was made to preserve the Wise's Dower where the Husband had forseited.

Wife of a Fointenant. If one Jointenant makes a Forfeiture of his Part, his Wife shall not be endow'd, because the Husband was never sole seised.

The like.

In that Case of Jointenancy, during the Joint Seisin, the Wife's Contract of Dower can never attach upon the Estate; because the other Jointenant comes in by the Feudal Contract, fuperior to the Marriage Contract, fo to the Wife's Infeudation; for though the Marrirge Contract had been prior to the Tointenancy, yet it will not attach upon it, because the Estate in Jointenancy is fo created, that it should survive, Et cujus est dare ejusdem disponere; therefore, though the Marriage were precedent, yet it cannot take Place up on this Infeudation; but as foon as the fole Seisin commences, the Wife of the Feoffee shall be endow'd, and the Wife

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Endbut ex good.

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of the former Companion of the Alienor, who is now become Tenant in Common with the Feoffee.

Endowment ex assensu matris is good, Dower ex but ex assensu fratris, is holden not assensu good. and fra-

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And Dowment ex assensu patris, af- tris. ter Marriage, is good. Dowment ex mairis. assensu matris is good, because the Son is Heir apparent of her Lands; but ex Why not assensu fratris is not so, because one ex assensu fratris.

Brother cannot be faid to be Heir apparent to another, feeing the Brother may marry, and have Children, and the Dowment ex assensu, Gc. is good, at any Time during Marriage; because it is only ascertaining the Quantity of Infeudation, nor is there any Objection that this should over-reach a Purchafer; because when ever an Heir Apparent is married, it is sufficient Notice to enquire into the Settlement of the Land of the Father. If a Man marry a Woman in a Chamber, Dowment ad Ad offium Ecclesia,

ostium Camera, is not good. Dowment ad oftium Ecclesia of the What a Moiety of the Land, is good.

And a Woman married in a Cham- have ber, shall not have Dower by the Com-Dower. H. 16 H. 3. Quare of mon Law. Marriages made in Chapels not confecrated, &c. for many are by Licence

Dd3

from the Bishops married in Chapels, Gc. and it feemeth reasonable they in fuch Cases, should have Dower.

How formerly.

How in

later

Times.

Formerly they held, if they were not married at the confecrated Church, that the Wife should not be endow'd; because the Contract not being solemnly made, was no fufficient Foundation for an Infeudation; but afterwards, . when the Solemnization of Marriages in confecrated Chapels were allow'd, by Licence from the Bithops; and when it came to be held that Marriages were good, tho' done in Private, and in unconfecrated Places, fince they held that the Sacrament depended on the Priest, and not on the Place, they then determined (fince that the Heir's Title to the Demesnes depended on the same Title as the Wife's Claim to Dower) that Dower was demandable upon fuch private Marriages.

When a Moiety.

And in some Places the Wife shall have the Moiety in Dower, as in Gavelkind.

When the whole.

And in some Cities she shall have all by the Custom, which is call'd Free-Bench.

The Original of Free-Bench.

The Free-Bench feems to have its Rife from the same Custom as Borough-English in Villeine Tenure, the Lords having the Custom to possess their Te-

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nants Wives, they contracted that the younger Son should inherit; but the Wife obtained the Privilege over the whole Estate, and easily compounded for Crimes of that Kind.

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And Glanville sayeth, that ad offium Dower ad Ecclesiae a Man cannot assign more Ecclesiae, than the third Part in Dower; and if he how much do, the Wife shall be admeasured, &c. to be assured this Day, it seemeth that the Assignment ad offium Ecclesiae, of more than the Third Part, is good; and she shall not be admeasured for it.

The Reason why in Glanville's Time, The Rea-Endowment ad oftium Ecclesiae of more fon of the than a Third Part was not good, seems Use in that to be, because it hurted the Fruit of the Case. Lord's Feudal Service, during the Minority, but since it subsists on a Contract made on a Condition of Marriage, it ought to prevail, though it exceeds a Third; and this is the Reason of the latter Resolution.

And the Wife shall not be distrain'd Wife not to in the Lands which she holdeth in Dow-ed for er for the Debts of the Husband in his Debts due Life due to the King, nor in the Lands to the King. of Inheritance of the Wife, nor in the Lands, which she hath by Purchase, made by the Husband, to him and his Wife, and to their Heirs; and if she be D d 4 distrain'd

distrain'd by the Sheriff, she may sue forth this Writ,

The Form of that Writ. Reg. Brev. 142. b.

REX vic', &c. salutem. Cum secundum leges & consuetud' Regni nostri Anglia, Mulieres in terris & tenementis que tenent in dotem de dono virorum suorum, vel que de hereditate sua sint vel qua sibi perquisiverant, pro debitis virorum suorum Reddend. distringi non debeant, Ac Tu B. qua fuit uxor A. distringis in terris & tenementis suis que tenet in dotem de Dono prædiet. A. & etiam, &c. qua fuerunt de hæredit, ipsiûs B. sicut ex querela sua accipimus, Tibi præcipimus quod ipsam B. in terris & tenementis suis qua tenentur in dotem vel sint de hæreditate sua propria vel ex perquisito ipsius B. pro debito ipsius A. quondam viri sui Reddend. ne distringi fecer' contra legem & consuetudinem pradict. & districtionem si quam, &c. ei redeliberar facias, Teste, &c.

Another Farm.

There is another Form of the Writ in the Register for Tenant in Dower, which is directed to the Sheriss, commanding him that he do not distrain the Wise in those Lands which she holdeth in Dower, or of her own Inheritance for her Husband's Debt; but that Writ

Writ of it, testani bis Re and b feeme have 1 to pay be cha her Pu by he her L Lands, before the Kin cordin

the Kier, it is 4 Assistant Wilder, dingly.

And gifter if Sheriff, Lands band ar the Husif they them is Death of the

Writ hath these Words in the End of it, Dum tamen haredes & Executores With this testamenti ipsius A. ad debita illa no-Addition. bis Reddenda, Sufficient' non Distring'; 143. and by these Words in the Writ, it seemeth, that if the Heir or Executor, have not fufficient of Lands or Goods to pay the Debt, that the Wife shall be charged, and the Debt distrain'd for her Purchase in the Joint Lands made by her Husband and her, but not in her Lands of Inheritance, nor in the Lands, wherein she had Title of Dower, before the Husband became indebted to the King; and that the first Writ is according to Law in these Cases.

But if the Husband be indebted to Husband the King before she hath Title of Dow-the King. er, it seemeth to be otherwise. Vide 4 Assis 36, 53. Assis Case accor-

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And there is another Writ in the Re- A Writ gifter for the Wife, directed to the frain in Sheriff, that he do not distrain her in the Lands Lands and Tenements which her Hust purchased band and she purchased jointly; before Baron and the Husband was indebted to the King, Feme. if they purchase the Lands jointly to them in Fee, the Lands, after the Death of the Husband, in the Hands of the Wife, and her Heirs, shall be

be discharged of the Debt; and if she be distrained, that he deliver them

again to the Wife.

Where the And by the same Reason, tho' the Wife holds Husband be before indebted to the discharged King, that if he and she purchase the King's Land jointly in Fee to them, after the Debt. Death of the Husband, the Wife, and her Heirs, be discharged of the Debt.

And there is another Writ in the Re-Where Tegister, for Tenant in Dower, directed nant in Dower not to the Sheriff, that he do not distrain to be dithe Wife for the Husband's Debts, befirained cause that the Heir, who ought to pay for the King's. the same out of the Lands, is within Debt. Age, and in Ward to the King; or because that other Tenants, who should be charged with the Payment thereof,

are omitted.

The like.

And so, it seemeth, the Land of the Tenant in Dower shall be discharged, if there were other Lands of the Husband's to pay the Debts; and those Writs appear in the Register, fol. 143.

Another
Writ in
the Register, not
to distrain
for the
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And another Writ directed to the Sheriff, that he do not distrain the Wise who holdeth Lands in Dower, for the Debts of the Husband, which he owed to the King, before the Contract of Marriage between him and the Wise purchased jointly in Fee, for the Husband's Debts, which he became Debtor

for bef have for rected of the that the find the discharge of the de Executenential qua in opes no

CTC. The is, that fubfeque Wife's I feudatio Marriag the Affi the Cha for if during the Wi make a impeach there m fince the Lands; fore the

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for before the Purchase; and she may have fuch Writ out of Chancery, directed unto the Treasurer, and Barons of the Exchequer, commanding them that they enquire thereof; and if they find the same, that they surcease and discharge the Wife, with this Proviso of the Writ, Proviso, quod debita illa de Execut. & Hared. pradict. A. ac tenentibus terrarum qua fuerunt sua G que inde de Jure debent onerari ad opes nostras levand ut Justum est. Teste, erc.

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The true Distinction of these Cases The Diis, that if the Debt to the King be finction subsequent to the Marriage, then the Cases. Wife's Dower, being a Contract for Infeudation, at the very Time of the Marriage, and which binds the Lands, the Affignment of Dower over-reaches the Charges, by Debt of the King; for if the Husband could not alien, during the Coverture, so as to defeat the Wife's Infeudation, he could not make any other Charges that would impeach it; and therefore the Wife there may have a general Prohibition, fince the King's Debt does not affect the Lands; but if the King's Debt was before the Marriage, then the Contract for Infeudation, was subject to the Burthen of the King's Debt; and therefore

fore there she can only have a Special Prohibition, with an Ita quod, that there are Lands in the Hands of the Heir, or Chattels in the Hands of the Executor, to answer the King's Debts: for if there be not, then the King may levy the whole Debt upon the Dowress, and she must come upon the Feoffees of the Husband, who are equally liable to Contribution; for the Hufband, by fubfequent Alienation, cannot put fuch a Difadvantage upon the Crown, that has given him Credit, as to force the Crown to bring in every Alience, in order to be paid by them; but the King has a Right to feife the Lands in whosesoever Hands he finds them, if fuch Person comes in subsequent to fuch Charges.

Where a Writ De dote Afsignanda lietb. The Writ De dote assignanda lieth, where it is found by Office that the King's Tenant was seised of Tenements in Fee, or Fee-tail, the Day he died, &c. and held of the King in Capite, then the Wise may, and ought to come into the Chancery, and there make Oath, that she will not marry without the King's Licence; and thereupon the King may assign her Dower in the Chancery of those Manors and Lands.

Marriage
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There was to be no Marriage of the Dowress, during the Nonage of the Heir,

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Heir, that was in Ward of the King, without the King's Licence, because, by the general Constitution of the Feudal Law, every Feudatory of the Crown was to marry with Licence, that there might be no Disparagement to the Family, whilst they were under the Care of the Crown; and the Dower being assigned by the Crown, was Dower as in the Nature of a Royal Inseudation, signed by therefore under the same Necessity to take out a Licence, and thereupon she shall have a Writ unto the Escheator, where the Lands are, which shall be thus,

REX escheator' suo in Com. B. sa-The Write lutem. Sciatis quod de Terris & Tene-to the mentis que fuerunt N. defuncti, qui de Escheanobis tenuit in Capite, & qua occasio-Reg. ne mortis ejusdem N. capt. est in ma-Brev.297. num nostram assign. J. que fuit uxor pradict. N. tertiam partem maner. de T. & C. in Com. T. cum pertinentiis, necnon tertiam partem purpart. que fuit ipsius N. cum libertate honoris Winton & visus Franci plegii in dicto Com. T. habend. in dotem ipsam de maneriis & purparte prædict. secundum legem & consuetudinem Regni nostri Anglia contingentem, necnon de Mensu E. principis Wallix filii nostri charis.

chariss. Custod. maner. de R. in Com. Bucks quæ ad x. libras extend. per Ann. sicut per extentas inde de mandato nostr. fact. in Cancellariam nostram retorn. est compert. assignavim. præfat. J. ditt. maner. de N. cum pertinentiis pro dote sua dictor. maner. de K. N. habend. infra prædict. & ideo tibi præcipimus quod eidem J. dict. maner. de N. cum pertinentiis liberes habend. in dotem suam sicut prædict. est. Teste, &c.

Vide Ret. finium 1 E. 1. Mem. 21. A Command to the Escheator, to seise all the Lands, De quibus A. si, Gc. G etiam quod Margeria qua suit uxor pradict. A. 20 libras de terr. G tenement. prad. assignari faciat donec rationabilem dotem ipsam conting. secundum legem G consuetudinem tibi fecerit assignari. Vide Accord. Close Roll, 2 E. 1. Mem. 15.

When she may have a Writ to the Escheatar.

And when the Wife hath made her Oath in the Chancery, she may have a Writ de Dote assignanda, directed to the Escheator, to assign her Dower; and the Writ shall recite, that she hath made her Oath in the Chancery, &c. but the Use is to make the Assignment of Dower in the Chancery, and to award a Writ unto the Escheat-

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or, to deliver the Lands affigned unto her; and altho' the King doth commit the Custody of the Land unto another, yet the King may assign Dower to the Wise in Chancery; and she shall have a Writ to the Escheator, to deliver unto her that Dower, as appeareth by the Regist. 298. a. Vide Keilw. 133. it seems that the Committee cannot assign Dower. Quare tamen, if it shall not be good till the Heir sues Livery; and the Writ shall be such,

REX Escheator', &c. sal. Cum inter Another ceter. terr. & tenement. J. que fuit uxor Writ to N. defuncti, qui de nobis tenuit in ca-the Efpite per nos de terr. & tenement. qua fuerunt prædict. N. in dotem assignat. assignavimus eidem J. partem maner. de G. cum pertinentiis in Com. B. necnon tertiam partem propartis, que fuit ipsius N. cum libert. honoris W. & visum Franci plegii in eodem Com. habend. in dotem infra pradict. tibi præcip. quod eidem J. cujus sacram. quod non maritabit sine licentia nostra recipimus dictas tertias partes in Baliva tua, in præsentia Custod. eorund. maner. G tertiæ partis, per vos inde præmuniend. si intrare voluerit, vel attorn. su in hac parte assignari, & liberari, fac. habend. in dotem, sicut prædictum eft, o

est, & cum assignationem, &c. Teste,

And if the Wife, after the Death of the Husband, doth come into the Chancery, and prayeth her *Dower*, there the King may grant a Writ unto the Escheator, commanding him to take Security of the Wife, that she do not marry without, &c. and to assign *Dower* unto her; and the Writ is,

Reg. Brev. 297. a.

REX Escheat. sal. Præcipimus tibi, quod capt. sacram. M. que fuit uxor W. defuncti, qui de nobis tenuit in capite, quod se non maritabit sine licentia nostra eidem M. rationabilem dotem de omnibus terr. & tenement. qua pradiet. W. quondam vir suus tenuit in Dominico suo ut de feodo in Baliva tua, die quo obiit, & que per mortem pradict. W. capt. fuerunt in man. nostram & in manu nostra sic existent. secundum legem & consuetud. Regni nostri Angliæ contingent. per extent. inde fact. vel aliam si necess. fuerit iterato faciend. in prasentia B. per te inde pramuniend. si interesse voluerit assignari facias & cum a signationem illam sic feceris, eam sub sigillo tuo distincte & appertemittas, ut eam in Rotulis Cancellaria nostra

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And if a Man dieth feifed of Lands, When the which are holden by Knight-Service of Wife to any Manor, or otherwise, of any Abby, Chanterja Bishoprick or Priory, or such as are in the King's Hands, by Reason of the Vacancy of the Abbot or Bishoprick, &c. then, if the Wife will have Dower, she ought to fue in the Chancery, to have fuch Writ directed unto the Escheator, to affign her Dower; but there the Wife shall not take Oath that she will not marry without the King's Confent, as appeareth by the Writ; for the Prarogative does not obtain in that Case, for the King assigns Dower, as Guardian of the Temporalties, and not as superior Lord; and the Writ is

REX, &c. Pracipinus tibi; quod Writio A. qua fuit uxor B. defuncti, qui de the Eschedula de Burgo S. Petri nuper va-when the cante & in manus nostras exist. tenuit Lands are per servitium militare rationabilem do-spiritual tem suam de omnibus terr. & tenement. Lords: &c. qua pradict. B. vir suus tenuit de Abbatia pradict. in Baliva tua die quo obiit, & post mortem ipsius B. in man. nostras exist. &c. ut supra.

E e

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And the like Writ may be fued by the Wife, for Lands which her Hufband held by Knight-Service of the Manor of him who is in Ward of the King, by Reason of his Nonage; but there she shall not make Oath that she will not marry, Gc. no more than in the precedent Case; causa qua, Gc.

And the King may affign Lands in Dower, in the Chancery, rendering Rent yearly, Gc. to the King, because the Lands do exceed the Value of the Third Part of all the Tenements, whereof the ought to have Dower; and then upon that Affignment made in the Chancery, she shall have such Writ

to the Escheator.

Writ to the Efcheator, where there is a Rent referved.

REX Escheat. Sal. Sciatis, quod de terris & tenementis, que fuerunt E. de B. defuncti, qui de nobis tenuit in capite, o que occasione mortis ejusdem E. capta sunt in manus nostras, assignavimus M. qua fuit uxor prædict. E. maner. subscripta, viz. de B. C. &c. cum per-tinentiis in Com. T. quæ ad 100 libras extend. per Ann. habend. in dotem, ipsam de terr. & tenement. pradiet. secundum legem & consustud. Regni nostri Anglia, contingent. Reddend. inde nobis per Annum, ad Scaccarium nostrum tantum, quod excedit dotem supraprædie eidem tiis lib forma And

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prædictam. Ideo tibi præcipimus, quod eidem M. dict. maner. cum pertinentiis liberes: habend in dotem suam, in

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And if the Wife be impotent, so as she cannot come into the Chancery, to make Oath, and to demand her Dower Where to be assign'd by the King, if she will de-Dedimus to go take mand Dower, she may have a Spe-the Dowical Writ, directed to certain Persons ress's Oath to take her Oath, and receive an Attorney for her, to sue for her Dower in the Chancery, &c. the Writ appeareth in the Register, f. 298.

And if the King makes Livery unto the Heir, at his full Age, faving unto the Wife her Dower, to be affign'd by Livery to the King, then if the Wife will de-the Heir, mand Dower, she ought to sue for Salvo of the same in Chancery; and if she do de-Dower. mand her Dower there, then shall issue a Special Writ unto the Escheator,

that he may warn the Heir to be in Chancery at a certain Day, &c. and there the Wife shall have the same Day to receive her Dower, &c. and the Writ which shall issue against the

Heir is,

REX Escheat. sal. Cum Ed. nuper

Rex Anglia, Pater noster 11 die Jan. The Writ

prox. prater. ceperit homagiun J. de B. to the Et
filis & haredis J. de B. defuncti, de in that

E e 2 omnibus Case.

Reg. Brev. 298. a.

omnibus terr. G. tenement. que idem J. pater suus tenuit de dict. patre nostro die quo obiit, &c. & terras, & tenementa illa reddiderit, ea que sibi mand. liberari, salvo jure cujuslibet, & Salva M. que fuit uxor pradict. J. rationabili dote sua ipsam de terr. & tenement. pradict. secundum legem & consuetudinem Regni nostri Anglià contingent. & ei prout moris est assignand. sicut per inspectionem Rotulorum Cancel. nobis conftat, as prafat. M. nobis supplicaverit ut ei dotem suam de terr. & tenement. prædict. contingent. secundum legem, &c. assigna-ri faciamus, per quod diem dedimus præfat. M. quod sit in Cancellaria noftra in crast. animarum, Gc. ubicunque, Gc. ad recipiendam dotem suam prædictam, tibi ideo præcipimus, quod Scire facias prafat. J. quod ad diem prædiet. intersit assignandæ dotis prædict. si sibi viderit expedire, & ha-beas ibi nomina; &c. & hoc breve, Gc. Tefte, Gc.

But if the King maketh Livery unto the Heir, by his Writ, directed unto the Escheator, by which Writ he commandeth his Escheator to deliver Seisin unto him, of all his Lands, &c. Sako jure cnjustibet, and he putteth not in the Writ these Words, Salva M. qua

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fuit uxor, &c. rationabili dote ipsius When the Words de terr. & tenement. ipsis conti-Salva dote gen. per nos asignand, then, in that are not in Case, the Wife ought to sue her Writ the Writ. of Dower against the Heir, if she will demand Dower of those Lands, because the King made Livery generally of those Lands by his Writ, without any Refervation of Dower to be affigu'd by him, Gc.

And if the King makes a Refervation of Dower, to be affigued by him, by his Writ of Livery, which is directed to the Escheator, if the Wife never demanded Dower, or if the have Dower assign'd to her by the King in Where the Chancery; yet after the Assignment Heir Shall fue Livery made by the King, the Reversion there- of a Reof is in the Heir, and he shall not sue version, af-Livery of that Reversion, after the Death of Death of the Tenant in Dower, be-Tenant in cause the Writ of Livery doth not re-Dower. ferve any Thing to the King, but Assignment of Dower to the Wife; but the Writ doth command the Escheator to deliver Seisin of all the Lands, and that the Escheator doth, and by that the Livery of all the Land passeth from the King; and therefore it followeth, that when the Wife is affign'd her Dower by the King in Chancery; yet the Reversion doth remain in the Ee 3 Heir,

Heir, &c. for which he shall not sue a new Livery of that Reversion, after the Death of the Tenant in Dower, &c. tamen Quere of that Cafe.

That the perfect the Infeudation of Dower,

When the King's Feudatory dies, du-King is to ring the Minority of the Heir, the King is to perfect the Infeudation of Dower, and therefore to make the Affignment; and where, and tho' the King does not make the Affignment, during the Minority, yet he may referve to himfelf the Power of Affignment after the Heir's full Age, and that is a Prerogative for the Benefit of the Dowress, since it may be better, and more compendiously done by a Petition in Chancery, and fetting it out by the Escheator, than by a Suit at Law, which is subject to great Delay; and therefore the King may, if he pleases, on the Livery to the Heir, make an Exception of his Prerogative, touching the Assignment of Dower, and then the King shall assign Dower at the full Age of the Heir; but then fuch Assignment, being an Infeudation of the Dowress, in delivering the Dower out of the King's Hands; by Consequence, the Heir need not sue Livery of the Reversion; but if the Dowress does not Petition, then the King often granted the Livery to the Heir, without any Exception, touching his

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his Prerogative of assigning Dower, and then the Dowress was put to her Suit at Common Law, against the Heir, if he did not assign, because Livery giving the whole Demesses out of the King's Hands, into that of his Tenants, without any Reserve, the King parts with his Power of making any Inseudations of that Estate; and that must be construed to be the Intent of the Livery, where it is without any Reservation, but the Onus of the Dowress follows it, into the Hands of the Heir, where she must obtain it, as by Law she may.

Law she may.

And if the Wife be assign'd Dower Where the in the Chancery, and afterwards it is King shall furmised by the Heir, or by Another Writ to for the King, that the Land assign'd to the Estimate Wise, is not extended to the very to make a Value, but that the Land assigned new Exunto her, is much more in Value tent. than it is extended at, and that the Lands which remain in the King's Hands are extended to the very Value,

the Escheator, to make a new Extent; and upon that Writ return'd, if it be found that the Land assign'd to the Wife, is of greater Value, &c. then upon return thereof, a Scire facias shall be

awarded against the Wife, to shew

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Cause wherefore she shall not be anew endow'd, &c. and if the be warn'd. and make Default, it seemeth she shall be a-new endow'd for the Default; or if she appear, and cannot fay any Thing contrary to that new Extent, she shall be endow'd a-new, so as Part of the Land assign'd to her, shall be taken from her at the King's Pleafure; or the King may make a new Affignment of all that she had in Dower, if he pleaseth, and a new Writ shall be to the Sheriff, to deliver her Seifin thereof, so newly affign'd to her.

Quere the Use of this Point. Where the So if the Dower of the Feme be Dowress

evicted upon elder Title, upon the Record brought into Chancery, by which re-feize the she was evicted, she shall have a Scire facias to re-seize the Lands, and to be endow'd de novo of the Residue, tho' after Livery made to the Heir, 43 All. 32. it feems also, that if Dower be affign'd to the Wife, within Age, in Chancery, and after Livery is made to the Heir, she may have a Writ of Dower of the Residue. 18 E. 3. 29.

And if the Wife maketh Oath that Where the King shall she will not marry herself without the fend a King's Licence, and is endow'd upon Writ to the same, &c. and afterwards she marrithe Efcheator to eth without Licence, Gc. then the King ve-feize **shall** the Lands.

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shall send a Writ to the Escheator, that he re-seize all the Lands which she holdeth in *Dower*, as appeareth by the *Register*, and not all the other Lands which she or her Husband had in their own Right; and the Writ is,

REX Escheat', Gc. Cum A. que The Form fuit uxor J. de B. defuncti, qui de no- of the Writ. bis tenuit in capite, que nuper sacramentum prastitit corporale quod se non meritaverit Licentia nostra super boc prius non obtentà, ut accipimus tamen se sine tali Licentia nuper maritasse, nos contemptum hujusmodi nolentes transire impunitum, tibi præcipimus, quod si ita est, tunc terras, & tenementa omnia que predicta A. tenet in dotem de Hæredit. ipsiûs J. in Baliva tua, sine dilatione capias in manus nostras, ita quod de exitibus inde provenientibus nobis respondeas, ad Scaccarium nostrum quousque nobis de forisfactura ad nos inde proveniente satisfact. fuerit, vel aliud inde duxerim. demand. Tefte, erc.

## Df a Writ De Quod ei Deforciat.

Where it lieth.

THE Writ of Quod ei deforciat, lieth where Tenant in Tail, or Tenant in Dower, or by the Curtefy, or for Term of Life, lose their Lands by Default, in a Pracipe quod Reddat, brought against them, they have not any other Remedy, if they were summon'd according to Law, &c. but this Writ, which is given by the Stat. of Westm. 2. c. 4. and the Writ is mention'd in the Statute.

From nubence it arose.

The Writ of Quod ei deforciat seems to have arisen from the Inconveniency which Wives fuffer'd, by a Trick, to disappoint them of Dower; for the Husband was wont to be impleaded by his Aliences, and lofe by Default; and Judgment being given for the Alienee to recover, on fuch Default of the Husband, his Seisin, he came in by Title Paramount, and therefore defeated the Seifin of the Husband, and confequently the Title of the Wife to Dower, and it was generally held that no Judgment by Default, could be defeated, but by the very Tenant; and therefore fuch was Mischievous, not only to Tenant in Dower, but to Tenant for Life, and Tenant in Tail, that happen'd

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pen'd to lose by Default; for they could not have a Writ of Right, because they were not Tenants in Fee, so this Statute gave them a Quod ei deforciat, by which that Recovery could not bar the Demandant's Right, but the Defendant was oblig'd to sue an elder Title; but the Issue in Tail could not have this Writ, because he had his Formedon in the Discender, by the Statute De donis; yet the Writ or Count do not suppose any Recovery. 18 H. 6. 25. is upon losing by Default in a Cessavit, Reg. Brev. 171. and the same is such,

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t

REX vic', &c. Præcipe A. qued TheForm. reddat B. quæ fuit uxor C. unum mefsuagium cum pertinent. in N. quod clamat esse rationabilem dotem suam, &
quod idem A. ei injuste deforciat, ut
dicit, &c.

And if the Tenant in Frank-marriage bring fuch Writ, it is,

Quod juste, &c. reddat, &c. quod clamat esse jus & maritagium suum, & quod idem J. ei injuste desorciat.

And if Tenant in Tail. Præcipe, &c. quod clamat tenere sibi, & hæred.

de corpore suo exeuntibus, & quod pradict. A. ei injuste deforciat, &c.

It is good, without shewing whose Gift it is in his Count. 29 E. 3. 47. 30 E. 3. 31. for the Writ is brought only after a Recovery by Default of his own Seisin; and therefore who made the Gift, is not material, but Matter of Evidence only; and confequently need not be fet out in the Count.

And for Tenant for Life, the Writ is,

2:od clamat tenere ad terminum vita fue, (and if Tenant by the Curtefy) Quod clamat tenere per legem Anglia.

That the The Curtefy is enti-Writ.

And the Register is, That this Tenant by Writ for Tenant by the Curtefy, is by Equity of the Statute, and in this Man-Fled to the ner, tho' not nam'd by the 24th Chapter of this Statute; but if the Tenant in Tail, or fuch other Tenant, who hath a particular Estate, lose by Default, where he is not summon'd, &c. then he may have a Writ of Difceit, or a Quod ei deforciat, as he pleaseth.

Loging by . Default.

If a Man lose by Default in an Action of Waste sued forth against him, he shall not have a Quod ei deforciat, for the Verdict which found the Waste. Accord.

Accor Rolf. Dubit

And

Defau Baron to the ei, G do no that t in the Baron.

please

Not fault, lies in theref Record fuch ] appear Defau

4. 3.

In t for the Tenan Dower fet for Count, dant's there v

in Aba was no Accord. as to Waste, 3 H. 6. 29. by Rolf. Brooke, Quod ei deforciat, 7. Dubitatur.

And if a Man lose any Land by Losing Land in Default, in a Writ of Right, in a Court-a Writ of Baron, he may remove that Record in-Right. to the Common Pleas, and have a Quod ei, Gc. upon that Record. Item, If he do not remove it; but then, it seems, that the Quod ei, Gc. shall be sued in the Common Pleas, or in the Court-Baron, were he loseth the Land, as he pleaseth; tamen Quare.

Note; Upon a Recovery, by De-What no fault, in a Court-Baron, Quod ei, &c. Isue. lies in the Court of the King; and therefore it is no Issue to say, Nul tiel Record; but he ought to say no such Record or Recovery, by which it appears that the Tenements were lost by Default. 2 E. 4. 11. 10 H. 7. 9. 6 H.

4. 3.

In the Quod ei, &c. it was enough What for the Plaintiff to shew that he was enough to Tenant for Life, by the Curtesy, or in the Writ. Dower, &c. and he was not oblig'd to set forth the Recovery in his Writ or Count, but that came on the Defendant's Side; and he might plead that there was no such Record or Recovery in Abatement of the Writ; for if there was no Recovery by Default, then the Plaintiff

Plaintiff has misconceiv'd his Writ; for he might recover by Affize or Writ of Dower; and it would be impertinent to clog the Plaintiff's Writ or Count, with a Recovery by Default, because that is Part of the Defendant's Title; and therefore comes properly on his Side to shew; and if there be such Recovery, the Defendant must set it forth in Bar; and also his Title, as if it be by a Gift in Tail; and he had recover'd by Default, in a Formedon, he must fet forth and fay, that he is Paratus manutenere jus & titulum per donum pradict. and the Defendant, by Way of Replication, may traverse the Gift, or traverse the Seisin of the Dower. Raft. Entries 537. but the Plaintiff can never traverse the Recovery, because that is the Foundation of his own Writ; but if the Defendant traverfes it in Abatement of the Plaintiff's Writ, if the Record be in a Court-Baron, then it may be remov'd by a Recordari into the Common Pleas; but if the Recovery, by Default, be in a Court of Record, it must be remov'd by Certiorari and Mittimus.

That it lies against a Stranger, to the Recovery.

And the Quod, &c. lies against a Stranger to the Recovery; as if a Man recovers by Default, and maketh a Feofiment after, the Quod, &c. shall be brought against

again accor ei, C

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And Bench Scire f is the fault, shall Pleas.

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If tw lose the join in Defaul the oth against the Feossee. 44 E. 3. 43. accord. Dubitatur. 11 E. 3. 30. Quod ei, Gc.

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offght inft And if a Woman lose by Default, Where mot and taketh Husband, he shall have this Writ, the Quod, &c. but if Tenant in Tail medon. loseth by Default, &c. his Heirs shall not have a Writ of Quod, &c. but a Formedon, for that is his Writ of Right.

Where a Woman hath Dower af-Where the fign'd to her in Chancery, for the have the Nonage of the Heir, who is in Ward Writ. of the King; and afterwards the Heir, at full Age such a Scire facias in the Chancery, to avoid that Endowment, and recovereth on that Scire facias, in Default of his Wife; now the Wife shall have a Quod, &c. in the Common Pleas, upon that Recovery.

And so if a Man recovers in the King's The like. Bench, any Land by Default, upon a Scire facias sued out of a Record, which is there, the Tenant, who lost by Default, shall have his Quod ei, G.c. and shall sue the same in the Common Pleas.

If two Coparceners, Tenants in Tail, Coparcenlose their Land by Default, they shall ers. join in a Quod ei, &c. and yet the Default of one is not the Default of the other. M. 46. E. 3.

And

Tenant for And in a Pracipe quod reddat, if the Life, or in Tenant for Life, or in Tail, appears, king De- and after departs in Despight of the fault. Court, he shall lose his Land, and yet he shall have a Quod ei, &c. for that Recovery was by Default, because he did not appear when he was demanded.

Departure of the Court.

And if Tenant in Tail, or Tenant in Despight for Life, after the Mise joined in a Writ of Right, depart in despight of the Court, he loseth his Land, and there he shall not have a Quod ei deforciat, because Judgment final shall be given against him in that Case.

The Rea-

The Reason of the Distinction in the fon of the foregoing Cases, seems to be, because Diffinction. in a Pracipe quod reddat, in Entry, the Plaintiff only recovers Seisin; and thereupon, in this Cafe, the Quod lies, which was intended in this particular Case, instead of the Writ of Right for these Tenants; but where the Mise is joined upon the mere Right, and the Tenant departed in Despight, &c. Judgment Final was given against him; and there could be no new Writ of Right; therefore in these Cases, no new Writ of Quod ei deforciat was given in Lieu thereof.

Feme.

Baron and If the Husband and Wife be feifed of Lands, in Right of the Wife, for the Life of the Wife, and they lose the Land Land shall An

Land by D ei, G 5. C. Lord, other

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Land in Pracipe, by Default, yet they shall have a Quod ei, &c.

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And if Tenant for Life, lose his Tenant Land in a Cessavit brought against him, for Life, by Default, yet he shall have a Quod Default, ei, &c. by the Statute of Westm. 2 H. in a Cesso. c. 31 and M. & E. 3. because the savitation other Cases, by Default, makes Title by the Cesser, in Maintenance of the Default.

And if the Tenant, by a Receipt Tenant upon the Default of Tenant for Life by a Resappeareth, and is received, and pleadeth, and afterwards loseth by Action tried, yet the Tenant for Life shall have a Quod ei, &c. for the Judgment is given against him by his Default.

33 E. 3. Quod ei, &c. 17. 3 H. 4. 15.

33 E. 3. Avowry 255.

And if the Tenant vouch, and the Whether Vouchee will not appear, for which the the Tenant Tenant loseth by Default of the Vou-the Writtichee, it is to see whether the Tenant shall have a Quod ei, Go. for he loseth the Land by Default, the not his own; for the Statute is, Et cum temporibus retroactis cum aliquis amissset terram suam per defaltam, ne habeat aliud recuperari quam per Breve de recto; and there it doth not say, Per defaltam suam, but generally; but after in the Ff

Statute, it says, Provisum sit quod de catero non sit eorum defalta eis ita prejudicialis, &c. and by that, it seemeth that the Tenant ought to make Default; and it seemeth, that the Default of the Vouchee, is the Default of the Tenant, and so Default in both. Ouare hoc.

The like.

But if the Tenant vouch, and the Vouchee appeareth, and entereth into the Warranty, and afterward loseth by Default; now if the Tenant lose by the Default of the Vouchee, he shall not have a Quod ei, &c. because he shall not have Judgment over in Value against the Vouchee, by Default of the Vouchee, for that is not the Default of the Tenant; ergo Quere.

If the Vouchee do not appear, it is the Default of the Tenant, in not bringing in his Vouchee at the Day, in order to defend his Title; therefore the Demandant recovers by Default; and by Consequence the Writ lies for the Tenant that loses upon such Default, who becomes Demandant in a Quod ei deforciat, to make the former Demandant shew his Title, on which he could maintain his former Writ. Indeed if the Vouchee came in, and after made Default, no Writ of Quod ei deforciat lies; but such a Recovery may

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may be pleaded as a Bar to the Quod ei. Cc. because the Demandant in the former Action had Judgment to recover in Value; and therefore having the Recompence by the former Judgment, he could never maintain this Writ, to recover the Thing itself; but in the former Cafe, Vouchee not appearing at all, there could be no Judgment for Recompence in Value; and if the particular Tenant had not this Writ, he would be without Remedy; and this is the Reason, why in a Common Recovery, Tenant in Tail cannot implead the Recoveror in a Quod ei deforciat.

And if Husband and Wife lose, by Baron and Default, the Land of the Wife, which Feme. she holdeth for Life, if the Husband dieth, she shall not have a Quod ei deforciat, but a Cui in vita; for it is a Demise made by the Husband. The Statute Westm. 2. c. 3. expresly gives a Cui in vita, in this Cafe, therefore not within the Statute that gives a Quod ei deforciat; and when he bringeth the Quod ei deforciat, he counteth that he was seised of the Land in Demesne, as of Freehold, or in his Demesne in Tail, without shewing of whose Lease or Gift he was seised; and he Ff 2 ought

ought to alledge Esplees, in himself, Gc.

We have already mention'd why he

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Observa-

Writ.

need not shew of whose Lease or Gift he holds in the Count or Writ; but only in general fay, that he himself was feised, ut supra, because to alledge tions on the it generally, was sufficient to entitle himself to the Writ, because he lays the Esplees, which shews the Seisin; and if he shews the Seisin, he need not fay of whose Gift, because the Ouster is of that Seifin, which he has laid to be actually in him, and then the Defendant ought to deny the Right of the Demandant, &c. and shew how that at another Time, he recover'd the Land against the Demandant, by a Formedon, or other Action; and shall fay at the End of his Plea, Quod ipse paratus est

ad manutenendum jus, & titulum suum pradict. per donum pradict', Gc. inde petit judicium, &c. and then the Demandant in the Quod ei deforciat, shall traverse that Title, or shew Matter to bar that Title, &c. but he shall not make a Defence, and then plead in Bar,

as he shall do in the Formedon, &c. The Meaning of this is, that in the Formedon, after the Defendant has enter'd into the Defence, that is, Venit & defend. jus suum quando, Gc. & dicit

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quod præd' the Plaintiff Actionem suam versus eum habere non debet quia dicit co. and so shews Matter to defend himself from the Plaintiff's Action.

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ncit od But in the Quod ei deforciat, the Defendant, by Way of Bar, is to set up his former Recovery, by Default, and protect that Recovery by Title, and so to aver the Defence of that Title, whereby he recover'd; therefore it would be very improper for him to say Actionem suam versus eum habere non debet, because the Tenant has expressly given the Action, where there was a Recovery by Default; and to begin his Defence in that Manner, would be an Averment against the Statute.

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